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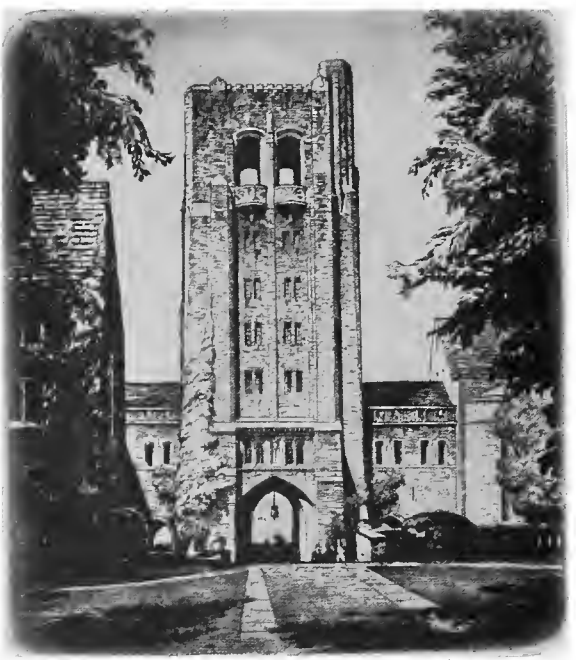

A PRACTICAL EXPOSITION

OF THE

PRINCIPLES OF EQUITY,

ILLUSTRATED BY THE

LEADING DECISIONS THEREON.

FOR

Students and Practitioners.

BY

H. ARTHUR SMITH, M.A., LL.B. (LOND.)

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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PREFACE

TO THE THIRD EDITION.

THE fourteen years which have elapsed since the last edition of this work was issued have been more than usually eventful in the history of English Equity. Changes have been introduced which have necessitated the re-arrangement and even the re-writing of some chapters and many pages.

It is true that, judging from the number of the Statutes which have appeared within this period, and comparing them with the bulky volumes which were issued in some preceding periods of similar length, one might seem justified in attributing to the Legislature a lower degree of diligence than that which characterised it in former years; but it will nevertheless be found that many changes of wide-reaching import have been effected. In some cases, notably with respect to the Land Transfer Act, 1897, and the Companies' Act, 1900, the time has not yet come in which a confident estimate can be made of the ultimate effect. The Trustee Act, 1893, and the Partnership Act, 1890, have not to any great extent changed the substance of the Law, but by summarizing and consolidating in statutory form the results of previous enactments and numerous judicial decisions they have carried forward in some degree the tentative efforts which had previously been made in the direction of codification, and have lightened the labours of both practitioners and students. It is hoped that the

effects of these and other important enactments have here received adequate and accurate expression and exposition, so far as the character and limits of this work require and admit.

Scarcely less important have been the reported decisions of the Courts. In dealing with Case-law it has been deemed desirable in this edition to give a less conspicuous position to what have long been known as "The Leading Cases in Equity." It is certainly still true that many of the cases so carefully selected by Messrs. White and Tudor stand as landmarks in the history of Equity. But in the nature of things the tendency has been gradually to diverge from the doctrines propounded by these more or less ancient judgments, and the time seems to have arrived in which attention should be invited to recent rather than to remote judicial opinion. Notwithstanding every effort to avoid overburdening the notes, the additional cases referred to in this volume amount to many hundreds.

It will doubtless be welcome to many readers to find that in all cases from 1880 to 1901 the references to the Law Journal Reports have been added.

H. A. S.

4, Elm Court, Temple,
October, 1902.

PREFACE TO THE FIRST EDITION.

In the course of his own reading for law examinations, and in directing the studies of others, the author has often experienced a difficulty in distinguishing between the principles of law and equity for the time being in force, and doctrines which have been rendered obsolete by the course of recent decisions or the current of legislation; and he has observed that this difficulty is often traceable to the fact that though the standard books in use have, whilst passing through their many editions, recorded the bare results of changes, yet no attempt has been made to modify accordingly the general outline and classification of the subject.

Another frequent difficulty has been to meet the requirements of examiners by establishing a clear association of leading principles with leading cases. It is indeed true that many works designed to effect this object are before the public, all, as far as equity is concerned, deriving their inspiration from the invaluable work of Messrs. White and Tudor. But this work, to which almost all living writers on the subject must acknowledge their obligations, is too voluminous for convenient use by students, and, moreover, it makes no pretension to a classification of its admirably selected cases, or to any systematic exposition of the principles of equity. The other works referred to are, on the contrary, all of them too small and elementary to be relied on alone. Readers have, therefore, been compelled to refer to one book as their main informant on their subject, and to another as a means of cementing the association between its leading doctrines and its leading decisions.

It has been the author's especial design in the preparation of this work to meet both these difficulties. With respect to the former of them, such an effort has been rendered all the more necessary by the extensive and radical change which was effected by the Judicature Acts of 1873 and 1875. Not only is detailed

reference to the provisions of these statutes necessary under almost every branch of the subject, but the fusion of equity and law thereby effected demands a fundamental change in the general classification and division thereof. It is evidently no slight advantage to the reader to have before him a classification based on existing conditions, rather than one which, having been devised under very different circumstances, has been from time to time corrected and modified in an unsystematic and disjointed manner.

But besides these statutes of supreme importance, there are many others which, not being retrospective, have introduced new law without rendering the old obsolete. In such cases the student has to learn two sets of doctrines, one of which is applicable to one set of cases, another to another. In order to avoid confusion in these circumstances the author has been careful to indicate the difference by the use of appropriate tenses, as well as by marking the change conspicuously in the division of the various chapters and sections. This may be illustrated by reference to the recent Real Property and Conveyancing Act (1881), the provisions of which, so far as bearing upon the matters discussed, have been fully set out.

With the view of bringing important leading cases prominently before the eye of the reader, they have been conspicuously printed under their respective headings. The selection of Messrs. White and Tudor has been followed in the main, as not only being excellent in itself, but as being familiarly known by the profession, and more or less so by all who have entered upon the study of equity. It has, however, been supplemented by many additional cases bearing on matters not treated of by those learned authors.

It is hoped that the designs thus attempted will prove to have been accomplished, at least to a sufficient degree to confer some benefit upon the present and future members of the profession.

H. A. S.

1, New Square, Lincoln's Inn,
January, 1882.

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THE PRINCIPLES OF EQUITY.

INTRODUCTION.

I. *Design of the Work.*
II. *Division of the Subject.*

Design of the work.

I. The design of this work is to present within moderate dimensions as complete a view of English equitable jurisprudence as is necessary for meeting the requirements of the examinations in this subject, and for a clear understanding of the cases which most frequently present themselves in the practice of the profession.

Not historical.

For this purpose it has not been deemed necessary to enter into the attractive subject of the history of equity. To do this effectively would require more space than could well be spared in a work of moderate dimensions, the contents of which must necessarily extend over a wide field of inquiry; and to attempt to compress so extensive a subject within very narrow limits would perhaps be worse than useless. Occasionally, indeed, something in the nature of an historical retrospect is necessary for the explanation of certain features of the jurisprudence; and in these cases—for instance, in introducing the subject of trusts—we have, as concisely as has seemed to us consistent with clearness, narrated the steps by which the jurisdiction has become established. Such glances at history, however, are only introduced as ancillary to the compre-

hension of the principles concerned, and are not designed to serve the purposes of those who desire to be well informed respecting the origin and growth of the jurisdiction of the Court of Chancery.

Classification and division of the subject.

II. It is obvious that a treatise designed as an exposition of so complex and intricate a subject as equitable jurisprudence requires to be systematic in form. Its multitude of details can only be brought within the grasp of an ordinary memory by means of a most careful classification. Yet to devise a system of classification which shall be at once logical, adequately comprehensive, and simple, is a problem of no slight difficulty; and scarcely two writers have agreed in its solution.

Story's division obsolete.

The division most familiar to modern students is that of Story, which distinguishes between the concurrent, the exclusive, and the auxiliary jurisdiction of the Courts of equity. It would be a presumption to praise or criticise the conclusion of so great a writer, and it argues no disrespect for it that it is not here followed. Owing to legislation which has remodelled our whole judicial system, such a division of the subject, however excellent at the time at which it was devised, is no longer sufficiently exact to be satisfactory.

Jud. Act, 1873, ss. 24, 25, 34.

It is undoubtedly true that by the provisions of the Judicature Act certain matters are specifically assigned to the various Divisions of the High Court of Justice, and it is equally true that in fact certain business and certain classes of actions are, in practice, for reasons of obvious convenience, confined respectively to the Chancery, the Probate, and the King's Bench Divisions. Yet to adopt terms employed to indicate the relations which existed between the old Court of Chancery and the old common law Courts as headings of the subject of the modern

administration of equity, is to assign too great an importance to distinctions, which, though in fact still existing in practice, are in point of principle and in theory altogether abolished.

The most important enactment of the statute above mentioned is that (*a*), "in every civil cause or matter commenced in the High Court of Justice law and equity "shall be administered concurrently, and that whenever "there is a conflict between the rules of common law and "those of equity, the rules of equity shall prevail."

A terminology, therefore, which suggests that equity cannot, under existing arrangements of procedure, be administered except in the Chancery Division, is clearly an anachronism, and is to some extent misleading. Indeed, that the special assignment above alluded to does not establish anything that can be called in accurate language an *exclusive* jurisdiction, is clear from the emphatic *dictum* of so high an authority as the late Sir G. Jessel, M. R., that "all the judges of the High Court have the same "jurisdiction; and it is clear that any judge may, if he "chooses, when an action has been brought in the "wrong Division, retain the action and exercise the jurisdiction" (*b*). This admission that the Division may be the wrong one in which to bring the action, coupled with the assertion of the right to exercise the jurisdiction, aptly illustrates the practical effect of the statute.

Auxiliary jurisdiction.

Similarly, it may be said that the consideration of what was called the *auxiliary* jurisdiction of Courts of equity as such is chiefly of historical interest. Formerly there were many cases in which, though the common law remedies were sufficient, and the jurisdiction of Courts of

(*a*) 36 & 37 Vict. c. 66, ss. 24, 25.

(*b*) *Pinney* v. *Hunt*, 6 Ch. D. 98, 100, 101; and see *Bradford* v. *Young*, 26 *ib.* 656.

common law was accordingly exclusive, yet it was necessary for one of the parties to have recourse to equity in order to procure evidence requisite for the successful assertion of the legal right. The jurisdiction of equity in these cases rested on the peculiarities of its procedure, and extended no further than was necessary to enable the party to maintain his position at law. The most important illustration of this branch of the jurisdiction was afforded by the stringent powers of equity to enforce discovery. But the Judicature Acts having established a system of procedure common to Courts of law and to those of equity, giving to the former identically the same powers as are enjoyed by the latter, it can no longer be necessary for any one whose action lies at law to seek for any preliminary or auxiliary aid in equity.

Law and equity still distinct.

Yet, notwithstanding the fusion of law and equity which has by the Judicature Acts been in a great measure effected, the distinction between the two systems must still, for many purposes, be regarded. As long, at least, as the terms "law" and "equity" are contrasted by examiners, the student must continue to contemplate them as distinct. And further than that, notwithstanding their present concurrent *administration*, the distinction remains substantial and real. The differences between legal and equitable estates and interests and principles continue to exist, and to produce most important results; so that if we were to cease to indicate the contrast by the terms "legal" and "equitable," we should have to invent others for the purpose (*c*).

Accordingly it has been found repeatedly necessary for the purposes of classification to refer separately to the treatment of questions by law and by equity, and in

(*c*) See *Joseph* v. *Lyons*, 15 Q. B. D. 280; 54 L. J. Q. B. 1.

other respects to contrast the two systems. It would have been tedious in every such case to remind the student of the provisions of the Judicature Acts: it suffices once for all to call attention most emphatically to the change.

Cross-divisions unavoidable.

It is perhaps impossible in dealing with such a subject as equity to avoid cross-divisions. The principle of trusts, for instance, reaches to almost all parts of the jurisdiction. The whole subject of mortgages might be treated as one sub-division of it; the remedies for fraud largely operate through its application; the law respecting married women and infants continually makes reference to it; and yet it would be obviously absurd in writing of equity not to treat such matters as mortgages and the separate estate of married women under completely distinct titles. A mutually exclusive classification of the subject-matter of equity must not, then, be expected. The best that can be done is to lay hold of the leading distinctions between the various branches of the jurisprudence, and in the separate investigation of each to clearly indicate their relation one to another.

Distinction between the jurisdiction founded on difference of substantive principle, and jurisdiction founded on peculiar remedies.

Story has sub-divided his heading of concurrent jurisdiction into two branches, the one where the *subject-matter* constitutes the principal ground of the jurisdiction; the other where the *peculiar remedies* administered in equity constitute the principal ground of jurisdiction (*d*). Under the changed circumstances above referred to, which have made all equitable jurisdiction concurrent, this now commends itself as an exceedingly apt and expressive division of the whole subject. It will be observed that it coincides with Bentham's famous division of law into substantive and adjective law. Though it will often, and indeed generally, be seen that the distinctive principles and the

(*d*) See Story's Eq. Jur. preface, and s. 77.

distinctive remedies of equity have acted in combination in establishing the various branches of its jurisdiction, yet the contrast between those matters in which the substantive doctrines of equity form the most conspicuous feature, and those in which the peculiarities of its procedure are most prominent, is sufficiently marked to form the groundwork of a scientific classification of the whole jurisprudence.

Adopted.

Adopting this as our main division, the work naturally divides itself into two parts. Part I. will comprise those subjects the jurisdiction of equity respecting which originated in, or chiefly rests on, a substantive difference between its principles and those of the ancient common law. Part II. will comprise those branches of the jurisdiction which have arisen chiefly from the peculiarities of its procedure or remedies.

PART I.

WHERE THE JURISDICTION RESTS ON THE DISTINCT SUBSTANTIVE PRINCIPLES OF EQUITY.

INTRODUCTION.

I. *Meaning of the word "Equity."*
II. *Distinction between Equity and Law.*
III. *Analysis of the Maxims of Equity.*

I. *Meaning of the word "Equity."*

Justice.

To glance for a moment at the first principles of jurisprudence, justice, as we learn from the Institutes of Justinian, consists in the rendering to every man of his rights (*a*).

Equity: its popular meaning.

In this large sense we find the word "equity," which is hardly in current use in the present day, employed, for example, in the Bible, as equivalent to justice, and opposed to "*in*iquity." It is, of course, only in a much narrower sense that the term, juristically applied in modern times to designate the principles which guide the Court of Chancery, must be understood. The layman, when he speaks of a decision or a transaction as inequitable, probably means in most cases that though there may be no legal remedy

(*a*) "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi*" (Inst. I. 1). In form, however, this is a definition of the moral feeling or quality of the just man.

open to him, he feels that before some higher and more perfect tribunal he would be held entitled to relief.

Popular language, therefore, generally a safe guide, exhibits the conception of equity as the *helpmeet or complement of law;* and also as the expression of *higher and more perfect principles of justice.* And this is, undoubtedly, the first aspect of the features of equity to which the student's attention should be directed.

II. *Distinction between Equity and Law.*

This familiar aspect of what may be called the more sympathetic administration of justice, of the principles, that is to say, which are invoked to mollify or to modify, in view of exceptional circumstances, the hard and fast rules of law, may be illustrated from the occasional infractions and relaxations to which all human ordinances must be liable. Law commands that the schoolboy shall learn so many verses for his evening task; equity, satisfied that he has a head-ache, excuses him half of them. The two principles, it is true, might be, and indeed often are, explicitly provided for in one code, but none the less is there an essential difference between them; the one dealing rather with the exceptional and the abnormal, and being less capable of exact definition, because it is ever adapting itself to the various devices and the various needs of human nature; the other, absolute, sweeping, not contemplating exceptions or relaxations which are not "in the bond," and from its nature, even where it is not already set down in the enactments of the legislature, more susceptible of definition in black and white.

The growth of equity.

History seems to indicate that the natural course in the establishment of a juridical system is to begin with rigid and comprehensive rules, and to leave the correction of the occasional anomalies or hardships to be separately dealt

with afterwards; and although the two administrative systems employed will in their maturer development tend, the one to overtake, and ultimately to coincide with the other, yet the difference between the principles we are describing is quite unaffected by the fact that the more settled doctrines of equity are continually crystallizing into the form of written or unwritten law.

Jus naturale.

A distinction precisely analogous to that which we observe in our own legal system presents itself in the Roman jurisprudence, upon which so much of our own is founded; between law, that is, as embodied in the Twelve Tables, the *Plebiscita*, and the *Senatus-consulta*, and the principles which guided the more elastic administration of the prætorian tribunal. These latter were elaborated and applied according to Papinian "*adjuvandi vel supplendi, vel corrigendi juris civilis gratiâ*" (*b*); and the "*jus gentium*" which the Prætor claimed to administer, and in accordance with which his edicts were framed, was, as Sir Henry Maine has explained, but a peculiar aspect of the *jus naturale*,—the law of nature and reason, to which all men appeal from the technicalities and imperfections of conventional systems. And as a matter of history there is no doubt that a similar spirit actuated our earlier chancellors in the establishment of the principal branches of English equitable jurisprudence. We find them referring to the writings of Moses and the prophets in just the same spirit, and for just the same purpose, as the prætors referred to the Stoic philosophers of Greece (*c*).

The next question will naturally be, how far and to what extent equity is to be regarded as supplementing the defects and correcting the imperfections of law; and this requires a more detailed answer.

The limits of equity.

In the first place, it is obvious that neither equity by itself, nor law (distinctively so called) by itself, nor even

(*b*) Dig. I. 1. 7.

(*c*) See Lord Ellesmere's judgment in *The Earl of Oxford's Case*, 1 Ch. Rep. 1; 2 W. & T. L. C. 590.

both together, can make any pretence of covering the whole sphere of that ideal justice which could only be treated as a branch of morals. They are necessarily confined in their working to certain very intelligible limits.

On the one hand, there will always exist injuries and details of right and wrong, which are too insignificant to be noticeable: "*De minimis non curat lex.*" In other cases, for reasons of public policy, the most conscientious administrator of justice must decline, for example, to afford to an injured party a remedy which he has been slow to demand, for a wrong which he has for a long time regarded with apparent indifference: "*Vigilantibus non dormientibus æquitas subvenit.*" And other limitations of a similar kind will occur, in the course of his reading, to the reflective student.

But within the sphere of practical jurisprudence, the administration of justice outside which is left to the influences of religion, morality, and self-interest, the whole ground is covered by, though by no means exactly apportioned between, the comparatively rigid principles of law and the more elastic principles of equity.

What is meant by the application to the latter principles of such epithets as "elastic" and "conscientious," and what is the practical effect of the distinctions between law and equity, will best be shown by a review of what are called "*The Maxims of Equity.*"

III. *Analysis of "The Maxims of Equity."*

The scope of the maxims.

It is necessary to premise that these do not, any more than more popular aphorisms, express in each and every case an exhaustive statement of some independent truth. On the contrary, like proverbs, the bearing of them lies to a great extent in their application, and to apply them unskilfully would be to deduce absurd and incongruous results.

Their relative importance, again, is by no means equal, and the ground which they respectively cover differs both in nature and extent. Without some premonitory warning of this kind, the student might be startled to find the plain meaning of certain maxims absolutely contradicted in practice; an anomaly which he may think has been slurred over or ignored in a text-book which presents them as an irregular codification of equitable jurisprudence, and not as a collection of rough definitions of interdependent doctrines. An obvious illustration of this is furnished by an aphorism which will in its place be more fully discussed —"*æquitas sequitur legem*," "equity follows the law." Now if equity always followed the law, no separate consideration of the two subjects would be necessary; whereas, in fact, the conflicting nature of the two principles is expressly recognized in the section of the Judicature Act already quoted. Accordingly we frequently find examples given under this heading of cases in which equity distinctly *overrides* the law. But it is clear that the chief use of the maxim is to anticipate a hasty generalisation on the part of the student to the effect that equity wantonly disregards the provisions of the common and statute law. While presenting, therefore, to his view a collection of the most celebrated dogmas in which the judicial wisdom of past generations has sought to emphasize the distinctive characteristics of a peculiar jurisprudence, it has been thought

advisable briefly to estimate in a separate paragraph their relative weight and practical limitations. The student will observe that in the following analysis each maxim is referred to by the number assigned to it in the following list:—

The Maxims of Equity.

(1.) Equity will not suffer wrong to go without remedy.
(2.) Equity follows the law.
(3.) When equities are equal, the first in time prevails.
(4.) Where equities are equal, law prevails.
(5.) He who seeks equity must do equity.
(6.) He who comes to equity must come with clean hands.
(7.) Delay defeats equities.
(8.) Equality is equity.
(9.) Equity regards the intent, not the form.
(10.) Equity looks on that as done which ought to have been done.
(11.) Equity imputes the intention to fulfil obligations.
(12.) Equity acts *in personam*.

These maxims may be considered in relation to the division which has been adopted of the whole subject, that is to say, as indicating—

1. The principles, the theory, of equitable jurisprudence;
2. The peculiarities of equitable remedies and procedure.

The application of maxims illustrated.

1. Equity, as we have seen, administers justice from a higher point of view than law (distinctively so called) and declines to be fettered or misled by technicalities. Thus where a legal transaction which in form amounts to an absolute transfer of property, is in spirit and intention a mere pledge to secure a loan, equity will say so, and give effect to the intention (9), simply because a legal right is

here, from the higher point of view, a wrong which equity cannot tolerate (1) (*d*).

Or again, if a bond made between two parties specifies a certain sum of money to be paid by either upon breach of the contract, a Court of equity, if satisfied that the sum named ought to be regarded as penal, that is, as a deterrent from the breach of the contract, rather than as a reasonable measure of the loss which such breach would entail, will (9) grant relief against the exaction of what is in truth a penalty, although in the bond it may have been described as liquidated damages (*e*). On a precisely converse principle, where there is evidence of an intention to do something, which has, however, not been legally done, equity (10) will ignore the latter fact, or, rather, will assume the contrary. Thus landed property which is by a testator's will directed to be sold, appears to the eyes of equity in the form of personalty, and is treated as such (*f*).

Of this kind of hypothetical jurisdiction we have other examples. A recognized procedure exists for the appointment of the official known as a trustee. But a Court of equity, on having its attention drawn to an individual, who, as having perhaps in a questionable manner become possessed in law of certain property, or as standing in a certain relation to other individuals, ought morally to incur the responsibilities of a trustee, will proceed at once to act on the supposition (10 and 11), and to compel him, in spite of his legally unimpeachable title, to perform the duties which he should have voluntarily undertaken (*g*).

Again, in the case of a person who is under an obligation to confer certain property on others—who has, for instance, covenanted to settle lands—and who has acquired but has not transferred property of the specified kind, equity will, by a pleasing fiction (11), regard the property as acquired with a view to the fulfilment of the obligation (*h*).

(*d*) See p. 254, Equity of Redemption.
(*e*) See p. 240, Relief against Penalties.
(*f*) See p. 486, Conversion.
(*g*) See p. 89, Constructive Trusts.
(*h*) See pp. 73 and 527, Resulting Trusts, Performance.

In all these cases it is idle to deny that the principles of equity conflict with and override the plain meaning of the law. But the reason is in each case apparent, and experience alone can guide the student in deciding what legal or quasi-legal wrongs can be redressed by a Court of equity. He must not infer that the two systems are eternally at variance (2). If equity, for instance, is said to delight in equality (8), equal distribution of property is also the aim of many of the provisions of law; *e.g.*, those which govern the distribution of the residuary personal estate of an intestate; and on the other hand, with the custom of primogeniture equity has never ventured to interfere. But there are cases where at law the survivor of several joint purchasers of certain property is held, on a somewhat arbitrary principle, entitled to the whole. Here equity, laying hold of the slightest evidence of a contrary intention, will say—No, let him be a trustee for the representatives of his co-purchasers, of their shares (*i*). Thus equity is said not to favour what is called the doctrine of joint-tenancy (*k*); but it can only interfere here, as elsewhere, upon special grounds (2).

Again, cases arise when apparently both parties can make out an adequate case for the interposition of equity; and since in such cases the interposition would often be nugatory, the conflicting equities are allowed to cancel out, and the operation of law is undisturbed (4) (*l*). It is on much the same principle that the assistance of a Court of equity is refused to a plaintiff whose own conduct *in the particular transaction* has not been equitable (6). If, for example, an infant by fraudulently concealing his age has induced his trustee to commit a breach of trust, the infant is clearly not the person to complain. If one party has been injured, the other has been deceived (*m*).

(*i*) See p. 86, Joint Purchasers.

(*k*) Story's Eq. Jur. 1066.

(*l*) See p. 138, *Thorndike* v. *Hunt*, 3 De G. & J. 563; *Sturge* v. *Starr*, 2 My. & K. 195.

(*m*) See p. 183, *Overton* v. *Bannister*, 3 Ha. 503.

And not only must the plaintiff have abstained from fraud or dishonesty, he must also be prepared to do what is equitable (5). Thus, when a husband finds it necessary to apply to a Court of equity in order to obtain possession of the equitable estate of his wife, he will only be aided upon the condition that he makes a fair settlement of the property upon his wife and children (*n*).

It has already been said, that when the conflicting interests of two or more parties are supported by equitable pleas of equal value, and (it may be added) when these are asserted with equal promptitude, equity, being unable to prefer one to the other, will leave law to take its course (4). But should this not be the case, then, *cæteris paribus*, *i.e.*, there being no other distinction between the rival claimants for equity to lay hold of, the first in time will be favoured (3). And even where there are no rival "equities," the party who has, as it is called, "slept upon his rights," applies to the Court under great disadvantage (7); for from such indifference and delay an inference will naturally be drawn most damaging to the equitable case of the complainant. Particularly is this the case where the subject-matter in dispute is of a fluctuating value (*o*).

A general example of the conflict of equity with law on the above general principles, as exhibited in a branch of the jurisdiction now abolished, may be found in *The Earl of Oxford's Case* (*p*). *Earl of Oxford's Case.*

In this case a bill was filed in equity in respect of a matter which had been already tried at law; and after the filing of the bill judgment was entered at law. The defendants demurred, relying mainly on the judgment as barring the relief in Chancery; but it was overruled by Restraint of proceedings at law.

(*n*) See p. 415, Equity to a Settlement.

(*o*) See pp. 94, 95; and Lord Blackburn's exposition of this maxim in *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1279, quoted and expanded by Lord Lindley, M. R., in *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196, 210; 66 L. J. Ch. 74.

(*p*) 1 Ch. Rep. 1; 2 W. & T. L. C. 590.

Lord Chancellor Ellesmere, who said that *there was no opposition to the judgment, nor would the truth or justice of the judgment be examined, but yet the chancellor might, where a judgment was obtained by oppression, wrong, or a hard conscience, restrain the person in whose favour it was issued from proceeding upon it.*

We have here also an illustration of the sense in which equity is said to act more particularly upon the conscience of the individual, to deal with him as a reasoning moral agent, and not as a passive subject, whose position and whose rights are arbitrarily determined by categorical rules of law (12). And this aspect of the administration brings us naturally to the consideration of

2. The peculiarities of the procedure and remedies of equity.

Decrees of equity *in personam.*

The decrees of a Court of equity are to be regarded, not so much as decisions affecting the property or rights in dispute, as in the light of directions or commands positive (*q*) or negative (*r*), addressed to the individual party or parties. It is seldom in the power of a Court literally to compel the performance by a recalcitrant party of a specified physical act. Its decrees are consequently said to be and in fact are only enforceable *by means of attachment and arrest*, the power of committal being often termed the keystone of equitable jurisdiction.

Penn v. *Lord Baltimore.*

A leading authority upon this point is the case of *Penn* v. *Lord Baltimore* (*s*).

The bill (*ss*) in this case sought specific performance of an agreement entered into between the plaintiffs and the defendant for settling the boundaries of land in America (then a British colony), by drawing lines in a particular manner specified.

(*q*) See p. 692, Specific Performance.

(*r*) See p. 744, Injunctions.

(*s*) 1 Ves. sen. 444; 2 W. & T. L. C. 939.

(*ss*) The "*Bill* of Complaint" was, under the practice of the old Court of Chancery, the first step in an Equity suit.

Lord Hardwicke, after an elaborate judgment, decreed that the relief sought might be granted, on the ground that though the agreement could not be enforced *in rem*, the strict primary decree in that Court was *in personam;* and the defendant being in England it could be enforced by process of contempt *in personam*, and sequestration, which was the proper jurisdiction of the Court. But the Court refused to decree quiet enjoyment of the lands, application for that purpose being proper only to Courts having jurisdiction over the land itself.

The great number of cases in which the principle here explained and established has been applied show that it is immaterial in such cases where the land or property concerned is situated, whether in England, or the colonies, or some foreign country. The only essential requirement is that the party to whom the decree will be addressed should be within the jurisdiction, and so subject to the process of the Court.

The limits of the principle.

On the other hand, it must be remembered that though the power of the Court is not restrained by the absence in the *lex situs* of such an equity as is sought, the jurisdiction cannot be exercised where it is absolutely excluded thereby. "If the *lex situs* excludes such equity, then the right to "hold the land free from it becomes one of the incidents "of property" (*t*). Nor will the Court entertain an action where the *title* to foreign land is in dispute, and a decision would involve adjudication on points of foreign law (*u*). Moreover, when the land in question is out of the jurisdiction no decree will be pronounced which purports *directly* to affect them. Thus, a partition of land in Ireland will not be decreed in England, simply because no power could be given to commissioners to go there and take the steps necessary for carrying out the decree (*x*).

(*t*) Westlake's Private Inter. Law, 64, 65.

(*u*) *Graham* v. *Massey*, 23 Ch. D. 743; 52 L. J. Ch. 750; *Companhia de Moçambique* v. *British South Africa Co.*, (1893) A. C. 602; 63 L. J. Q. B. 70.

(*x*) *Carteret* v. *Pettus*, 2 Ch. Ca. 214; 2 Swanst. 323, n.

This, however, is totally distinct from such a case as *Penn* v. *Lord Baltimore*, in which the decree dealt expressly with the agreement of the parties, and was directed immediately *in personam* (*y*).

For our present purpose we think this analysis of the maxims affords a sufficient illustration of the substantive and administrative distinctions between equity and law to enable the student to appreciate the classification of those matters especially allocated to Courts of equity by the Judicature Acts, as above mentioned. It directs us to the following subjects as falling under the first division of our work; that is to say, as falling within the jurisdiction of equity *chiefly* on the ground of its distinctive substantive principles.

Contents of Part I.

1. Trusts.
2. Frauds.
3. Equitable relief against the consequences of Accident and Mistake.
4. Relief against Penalties and Forfeitures.
5. Mortgages and Liens.
6. Suretyship.
7. Modifications of the Law as regards Married Women's Property.
8. The Guardianship of Infants.
9. The peculiar doctrines of Election, Conversion, Satisfaction, and Performance.

(*y*) *Whitwham* v. *Piercy*, (1895) 1 Ch. 83; 64 L. J. Ch. 249.

CHAPTER I.

TRUSTS.

SECTION I.—GENERAL VIEW.

I. *Historical Outline.*
II. *What may be the Subject of a Trust.*
III. *Who may be a Trustee.*
IV. *Who may be a* Cestui que Trust.
Charities.
V. *Classification of Trusts.*

I. *Historical Outline.*

Fidei-commissa in Roman law.

1. Students of Roman law are familiar with the device which was resorted to in the later days of the Republic for enabling testators to dispose of their property in favour of persons who were unable to take it directly by way of inheritance or legacy. Where the civil law threw any impediment in the way of such a disposition as was desired, the practice arose of bequeathing the property to someone who could legally take it, in reliance on, or trusting to, his good faith, to carry out the donor's intention with respect to it. Such gifts were known as *fidei-commissa*. At first, the only security for their proper execution was the honour of the person so entrusted; but in the reign of Augustus, though no legal action could be brought for their enforcement, jurisdiction was conferred upon a special prætor to take cognizance thereof, and to carry them into execution. From that time the operation of *fidei-commissa* revolutionised the testamentary law

of the State, and prepared the way for its later development in directions little thought of at the time of their introduction.

Common law restrictions on the alienation of land.

2. The history of English law presents to us a very similar chapter. The common law imposed many restrictions upon the conveyance and devising of landed property, which the possessors thereof continually exercised their ingenuity to escape. Absolute ownership in land the law has never recognised. Whoever was in immediate enjoyment of it could claim only an interest of greater or less extent and duration, subject to the rights of a superior lord, or at any rate of the Crown, as chief and paramount lord of all the soil of the country. It is plain that in many circumstances the power of free disposal of these interests might greatly interfere with such rights, especially with the ultimate right of receiving back the land itself. Particularly was this the case where land was transferred or assigned to a corporate body, such as an ecclesiastical order, or a bishopric, which subsisted perpetually, so that such land could never again revert as vacant or undisposed of to the superior lord. Accordingly, by the Statutes of Mortmain, lands were prohibited from being given for religious purposes (*a*).

Mortmain.

Introduction and nature of uses,

3. It was with a view to elude such restrictions that trusts, or as they were anciently called, uses, were introduced in England. The device was that the transferor, while retaining the legal estate, or conveying it as the law allowed, should declare the use of the estate to some third person, affixing on the conscience of the legal owner the duty of carrying into effect such declared intention. By this means it was sought to transfer the beneficial interest in a manner which the law would not sanction, or to persons or corporations whom the law would have forbidden to receive it.

at first

4. As in the case of the *fidei-commissa* of Roman law,

(*a*) But see now 51 & 52 Vict. c. 42.

these uses or trusts were originally dependent for their execution entirely upon the good faith or honour of the legal owner or trustee. But in the reign of Richard II., John Waltham, Bishop of Salisbury, who was then Lord Keeper, devised the writ of *subpœna*, by which a refractory trustee might be summoned before the Court of Chancery, there to answer on oath the charges of the beneficiary or *cestui que use*. This Court, claiming a special jurisdiction in matters of conscience, enforced the execution of the use or trust, though without affecting to interfere with the ownership at common law.

dependent on good faith.

Writ of *subpœna*.

The addition of this security for the enforcement of uses soon led to their extensive employment. Though arising from the restrictions on the assignment of freehold land, their principle was evidently applicable to other kinds of property, and trusts of real and personal chattels came into common use. Trusts came also to be employed for other purposes than the beneficial transfer of property. It was often convenient to give an interest to a trustee for the performance of some specific duty, such as to convey in a given manner, or to sell for payment of debts, &c. More important still was the application of the doctrine by which landowners obtained the power of devising their estates by will.

Extension of uses and trusts.

5. So extensive were the inroads thus made on the policy of the law, especially as to the legal incidents of tenure and the rights of creditors and purchasers, that uses and trusts soon became the subjects of statutory interference (*b*). It is not, however, now necessary to do more than refer to matters so completely obsolete.

Statutory interferences therewith.

At length it was determined to abolish the application of uses to freehold land entirely, and with that intent the Statute of Uses (*c*) enacted that where any person stood *seised of any hereditaments* to the use, confidence, or trust

Statute of Uses, 27 Hen. VIII. c. 10.

(*b*) 1 Rich. III. c. 1; 19 Hen. VII. c. 15; 26 Hen. VIII. c. 13.
(*c*) 27 Hen. VIII. c. 10.

of any other person, or of any body politic, such person or body politic as had any such use, confidence, or trust, should be deemed in lawful *seisin* of the hereditaments in such like estates as they had in use, trust, or confidence. The effect of this was at once to convert all uses, whether expressed in words, or merely implied in equity into legal estates, and thus to bring them within the rules of law.

To what uses it referred.

The technical meaning of the words employed, however, prevented the statute from entirely subverting the doctrine of trusts. The words "*seised*," "*seisin*," and "hereditaments" being only applicable to freehold estates, the statute was adjudged not to affect any trusts of personal property or chattels, or even leasehold interests in land, or copyholds. Seeing also that the statute referred only to cases in which one person was "seised, &c., to the use of any other person," it obviously could not affect special uses, *i.e.*, uses in which the conveyance was to the trustee for some limited or specific purposes, such as have been mentioned. All trusts, therefore, in property other than freehold, and all trusts in which the trustee was not a mere passive owner of a legal estate the benefit of which was secured to someone else, but had active duties to perform, remained as valid as before the statute.

Not to personalty, copyholds,

or special uses.

Effect of the statute destroyed,

6. This sweeping Act was, however, no sooner passed than its effect was destroyed by the construction put upon it by the judges of common law; and the old uses in real property at once reappeared under the modern name of trusts. This came about as follows. If there was a feoffment to A. and his heirs to the use of B. and his heirs, then before the statute A. took a legal fee simple, and B. was a *cestui que use*, who could only seek his remedies in Chancery. After the statute the same limitation would secure not only the use but also the legal estate to B. The use would, in short, at once draw to itself the legal estate. But the judges held that where there was a limitation to A. and his heirs to the use of B. and his heirs to the use of (or in trust for) C. and his heirs, then the

statute had no effect beyond the use limited to B. It converted the use first declared into a legal estate, but in so doing its power was exhausted, and a second use or trust, declared upon or after the first, remained unaffected thereby (*d*). Such being the decision of the judges, the Court of Chancery asserted the same authority over the first *cestui que use* as it had previously exerted over the primary feoffee, and enforced upon him the execution of the second use or trust. Thus it has been said that the whole effect of the Statute of Uses was to add four words, "to the use of," to every conveyance of lands.

and consequent reappearance of trusts.

Trusts having been thus curiously revived, have continued down to the present day; and under the development of the doctrines respecting them which took place under the later chancellors—especially Lord Nottingham—now constitute one of the most advantageous branches of equitable jurisdiction.

7. It is not necessary to add to this brief sketch a history of the various steps by which trusts have attained their present position in our jurisprudence. Sufficient has been said to indicate the nature of a trust, and to render a more formal definition intelligible. A trust has been defined as a beneficial interest in, or ownership of, real or personal property, unattended with the possessory or legal ownership thereof (*e*). But this is rather a definition of an equitable estate than of a trust, and it omits to take account of special trusts, such as have been already referred to, in which the object of the trust is the performance of some particular duty rather than the vesting of the beneficial ownership in some person other than the legal owner. *A trust is a duty deemed in equity to rest on the conscience of a legal owner. This duty may be either passive, such as to allow the beneficial ownership to be enjoyed by some other person, named the* cestui que trust, *in which case the legal owner is styled a bare trustee; or it may be some active*

Definition of a trust.

(*d*) *Tyrrell's Case*, Tudor's L. C. 335.
(*e*) 2 Spence, 875.

duty, such as to sell, or to administer for the benefit of some other person or persons; such, for example, are the duties of a trustee in bankruptcy.

II. *What Property may be the Subject of a Trust.*

Generally any property may be subject of a trust.

As a general rule property of any kind, legal or personal, may be made the subject of a trust.

Land of any tenure.

We have seen that trusts arose chiefly in connexion with freehold estates. They are equally applicable to copyholds, or to lands subject to any special customs, such as gavelkind or borough-English. In such cases equity as usual follows the law in its treatment thereof; thus equitable estates will be guided by the same rules, as to descent for instance, as legal estates in the same land.

Colonial and foreign land only *sub modo*.

Courts of equity will also, as seen in *Penn* v. *Lord Baltimore* (*sup.* p. 16), enforce natural equities in and contracts respecting colonial or foreign land, provided the parties be within the jurisdiction and the case admits of a remedy by action *in personam* (*f*). But trusts, strictly so called—that is, trusts of the nature of the ancient uses—cannot, it would seem, be engrafted upon foreign real estate, the tenure of which may have no harmony with the principles of English law (*g*).

Personal property.

Trusts are applicable to leaseholds, personal chattels, choses in action, and every description of personal property; and on the principle that *mobilia sequuntur personam*, as long as the party is domiciled within the jurisdiction of the Court, it matters not where the property in question is situate. The only limit is that in the case of property lying beyond the reach of the Court the practical obstructions in the way of executing the trust may be sometimes a bar to relief.

(*f*) *Norris* v. *Chambres*, 3 De G. F. & J. 584; *Whitwham* v. *Piercy*, (1895) 1 Ch. 83; 64 L. J. Ch. 249.

(*g*) Lewin, 10th ed., p. 49.

III. *Who may be a Trustee.*

Any person capable of taking and holding the property of which the trust is declared, and competent to deal therewith, may be a trustee. He should also be within the reach of the arm of the Court, or, in other words, domiciled within its jurisdiction. This condition, however, is dictated by reasons of obvious convenience, and does not prevent the appointment, in special circumstances, of persons outside the jurisdiction, as trustees (*h*). Proper qualifications of trustee.

(1.) The sovereign may sustain the character of a trustee, so far as regards the capacity to take the estate and to execute the trust. It is not clear, however, by what machinery a trust so vested could be enforced. Probably the only resource for such a purpose would be a petition of right (*i*). Sovereign.

(2.) A corporation may now be a trustee, since the ancient doctrine that trusts rested on the foundation of personal confidence has evaporated. There is ample jurisdiction in the Courts to enforce the performance of its duty by such a trustee (*k*). By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), it is expressly provided that bodies corporate of boroughs may, in certain cases, be treated for all intents and purposes as trustees. Corporation.

(3.) A married woman is legally capable of being a trustee; but notwithstanding that by the Married Women's Property Act of 1882, ss. 18, 24, a husband is no longer liable, in cases falling within the Act, for a breach of trust committed by his wife, and that the impediments in the way of her execution of legal assurances have been to a great extent removed (*l*), nevertheless, con- A married woman.

(*h*) *Re Simpson*, (1897) 1 Ch. 256; 66 L. J. Ch. 166, where the trustees were appointed for the purposes of the Settled Land Act, 1882.

(*i*) Lewin, 10th ed., p. 30.

(*k*) *Att.-Gen.* v. *St. John's Hosp.*, 2 De G. J. & S. 621.

(*l*) But see *Re Harkness and Allsopp*, (1896) 2 Ch. 358; 65 L. J. Ch. 726; *Re Brooke and Fremlin's Contract*, (1898) 1 Ch. 647; 67 L. J. Ch. 272.

sidering the general amenability of a married woman to the influence of her husband, there remains sufficient ground for considering such an appointment undesirable, except for special reasons (*m*). And this being so, it is not generally advisable to make an unmarried woman a trustee, since, if she should marry, the above disadvantages would at once arise (*n*), and the Court only makes such appointments when there are special reasons (*o*).

An infant.

(4.) An infant is under still greater disabilities, having no legal capacity or discretion. Any of his acts, beyond such as were merely ministerial, would be void. He could not be held guilty of a breach of trust. A case, therefore, is scarcely conceivable in which circumstances could warrant such an appointment.

An alien.

(5.) Formerly an alien, being disabled from holding English freeholds or chattels real, could not be a trustee of such. There was never, however, any legal objection to his appointment as trustee of chattels personal; and since the Naturalization Act, 1870 (*p*), an alien may hold property of any description, and may accordingly be trustee thereof.

Bankrupts.

(6.) Bankrupts are not absolutely disqualified from being trustees, and a person's bankruptcy has no operation upon the trust estate vested in him. Bankruptcy is, however, a good ground for the removal of a trustee (*q*).

Equity never wants a trustee.

(7.) Lastly, it is a maxim that *equity never wants a trustee;* and wherever by the declaration of a party or by operation of law a trust exists, equity will follow the legal estate, in whatever hands it may be (except those of a purchaser for value without notice), and enforce the execution of the trust. The lapse of the legal estate has no

(*m*) *Drummond* v. *Tracy*, Johns. 608, 611; *Re Berkley*, 9 Ch. 720; and see *Docwra* v. *Faith*, 29 Ch. D. 693; 54 L. J. Ch. 1121.

(*n*) See *Re Campbell's Trusts*, 31 Beav. 176.

(*o*) *Re Peake's Settled Estates*, (1894) 3 Ch. 520; 63 L. J. Ch. 109.

(*p*) 33 Vict. c. 14.

(*q*) 56 & 57 Vict. c. 53, s. 25; *Re Barker's Trust*, 1 Ch. D. 43; *Re Adam's Trust*, 12 *ib.* 634; B. A. 1883, s. 147.

influence upon the trusts to which it is subject. If the persons named as trustees fail, either by death, or refusal to act, or otherwise, the Court will provide a trustee; and if no trustees are appointed at all, the Court itself assumes the office, and will execute the trust. Moreover, by the Judicial Trustees Act, 1896 (*r*), the Court is empowered, at its discretion, to appoint its solicitor or other person to be a judicial trustee either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees; a power which it seems applies to executors as well as trustees (*s*).

IV. *Who may be a* Cestui que Trust.

Generally any one who can hold legally.

As a general rule anyone who is capable of taking a legal interest in property may, through the medium of a trust, enjoy an equitable interest therein. But this is not all; for in certain cases persons may take an equitable interest to whom a legal estate could not be similarly limited.

Married women's separate estate.

1. Thus an equitable interest could always have been conferred upon a married woman to her separate use, free from the control or participation of her husband; while until recently no property could be so limited at law as to exclude the rights of her husband during the coverture.

The sovereign.

2. A trust may be declared in favour of the sovereign, without the restriction which formerly existed, that the title of the property so limited should be matter of record.

Alien.

3. An alien might always have been a *cestui que trust* of personalty, and therefore, as it was held, of the proceeds of land directed to be sold, which was in equity considered as if it already were in the form of money. Before the Naturalization Act, 1870 (*t*), a trust of realty might have

(*r*) 59 & 60 Vict. c. 35.
(*s*) *Re Rateliff*, (1898) 2 Ch. 352; 67 L. J. Ch. 562.
(*t*) 33 Vict. c. 14.

been declared in favour of an alien, and might have been enforced by him against all save the Crown. The Crown, however, might have secured the beneficial interest by suit against the trustee. By that Act real property was, as we have seen, placed in this respect on the same footing as personalty.

Corporation.

4. A trust of lands cannot be limited to a corporation save by licence from the Crown. There is no such restriction on the enjoyment by a corporation of an equitable interest in personalty.

Charities.

5. A legal estate cannot be limited to the objects of a charity, as to the poor of a parish in perpetual succession; but in a Court of equity, where feudal rules do not apply, the intention of the donor will be carried into effect.

Charities.

Charitable trusts.

Trusts in favour of Charities, called by some Express Public Trusts, being in some respects peculiar, require a separate consideration, for which this is a convenient place.

43 Eliz. c. 4.

(1.) Whatever may have been the origin of the equitable jurisdiction as to charities, it was by the statute 43 Eliz. c. 4, that its limits and *modus operandi* were first clearly established; and it is to that statute that we must look for a definition of what objects are included under the term "charity" (*u*). In the preamble thereof the following objects are mentioned: "The relief of aged (*x*), impotent, and poor "people; the maintenance of sick and maimed soldiers "and mariners; schools of learning, and scholars in uni- "versities; the repair of bridges, ports, havens, causeways, "churches, sea banks, and highways; the education and "preferment of orphans; the relief, stock, or maintenance "of houses of correction; the marriages of poor maids; the "supportation, aid, and help of young tradesmen, handi- "craftsmen, and persons decayed; the relief or redemption

What are charitable objects.

(*u*) Story, 1145, 1155.
(*x*) *Pomeroy* v. *Willway*, 42 Ch. D. 510; 59 L. J. Ch. 172.

"of prisoners or captives; the aid or ease of any poor in-"habitants concerning payments of fifteens, setting out of "soldiers, or other taxes." The term "charity" in the sense in which it is used in Courts of equity includes only such bequests as are within the letter and spirit of this enumeration (*y*). The tendency has been to give to these words a liberal interpretation, and that being so, they will be seen to cover a very wide range of objects. Thus, not only gifts in aid of poverty, education and religion, but provisions for public beneficial works, such as the improvement of towns, paying off the national debt, the Royal Humane Society, a society for the suppression of vivisection, &c., have been deemed within the equity of the statute (*z*). There are, however, many cases in which relief has been refused on the ground that the objects were not such as could be brought under any of the terms employed. Thus no superstitious uses, such as to pay for prayers for the dead (*a*), or the maintenance of a lamp in a church or chapel (*b*), are within its purview, notwithstanding 23 & 24 Vict. c. 134; nor will general expressions of intended benevolence be carried into execution (*c*); nor gifts for the furtherance of sport (*d*); nor gifts restricted to the benefit of individuals (*e*). It is essential, moreover, that words be used sufficient to create an effective trust (*f*).

What not so

(*y*) *Morice* v. *Bp. of Durham*, 9 Ves. 399, 405; 10 *ib.* 522, 541; *Kendall* v. *Granger*, 5 Beav. 300, 302; *Pomeroy* v. *Willway*, *supra*; *Macduff* v. *M.*, (1896) 2 Ch. 451; 65 L. J. Ch. 700; Story, 1155, 1158.

(*z*) See *Yates* v. *University College*, 8 Ch. 454; L. R. 7 H. L. 438; *Jones* v. *Williams*, Amb. 651; *London University* v. *Yarrow*, 23 Beav. 159; *Obert* v. *Barrow*, 35 Ch. D. 472; 56 L. J. Ch. 913; *Farquhar* v. *Darling*, (1896) 1 Ch. 50; 65 L. J. Ch. 62; *Ormrod* v. *Wilkinson*, (1898) 2 Ch. 638; 67 L. J. Ch. 697; *Cross* v. *London Anti-Vivisection Society*, (1895) 2 Ch. 501; 64 L. J. Ch. 856.

(*a*) *West* v. *Shuttleworth*, 2 My. & K. 684.

(*b*) Story, 1164.

(*c*) *Ellis* v. *Selby*, 7 Sim. 352; 1 My. & Cr. 286; *Leavers* v. *Clayton*, 8 Ch. D. 584; *Macduff* v. *M.*, *supra*. As to whether or not a friendly society is a charity, see *Cunnack* v. *Edwards*, (1895) 1 Ch. 489; 64 L. J. Ch. 344; (1896) 2 Ch. 679; 65 L. J. Ch. 801; *Bruty* v. *Mackay*, (1896) 2 Ch. 727; 65 L. J. Ch. 881.

(*d*) *Jones* v. *Palmer*, (1895) 2 Ch. 649; 64 L. J. Ch. 695.

(*e*) *Thomas* v. *Howell*, 18 Eq. 198; *Att.-Gen.* v. *Hughes*, 2 Vern. 105.

(*f*) *Hunter* v. *Att.-Gen.*, (1899) A. C. 309; 68 L. J. Ch. 449.

Charitable trusts regarded with favour.

(2.) But wherever a valid charitable trust appears, a Court of equity is always disposed to treat it with favour, and in many circumstances it applies to such trusts a more liberal construction than it would in the case of a gift to an individual. The following cases afford illustrations of this:—

Thus Court will prevent a lapse,

(i.) If a testator gives his property to such person as he shall hereafter name to be his executor, and afterwards appoints no executor, or having appointed an executor, the latter dies in the testator's lifetime, in either of these cases, if the bequest be given in favour of a charity, the Court itself will supply the place of an executor and carry it into effect (*g*).

(ii.) If an estate is devised to such a person as the executor shall name, and no executor is appointed, or one being appointed dies in the testator's lifetime, the gift, if in favour of a charity, would be executed (*h*).

It was formerly deemed that in such cases as are dealt with in the two preceding paragraphs, if the bequests were to private persons they would fail (*i*); but the Court seems now to be empowered to carry such gifts into effect (*ii*).

and supply defective directions.

(iii.) If a testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain, or to some future act, the mode by which it is to be carried into effect, then a Court of equity will of itself supply the defect and enforce the charity. For instance, if a man bequeaths a sum of money to such charitable uses as he shall direct by a codicil annexed to his will, and dies without making such codicil, the Court will devote the gift to such charitable purposes as it thinks fit (*j*). But such assistance will only be given where the charitable intention is definite and general (*k*).

Doctrine of *cy-pres*.

(iv.) Where the literal execution of the trusts of a

(*g*) *Mills* v. *Farmer*, 1 Mer. 55; *Pocock* v. *Att.-Gen.*, 3 Ch. D. 342.

(*h*) Story, 1166; *Moggridge* v. *Thackwell*, 7 Ves. 36.

(*i*) Story, 1165.

(*ii*) *McAlpine* v. *Moore*, 21 Ch. D. 778; *Re M'Auliffe*, (1896) P. 290; 64 L. J. P. 126.

(*j*) *Att.-Gen.* v. *Syderfin*, 1 Vern. 224; 2 Freem. 261.

(*k*) *Leavers* v. *Clayton*, 8 Ch. D. 584; *Aston* v. *Wood*, 6 Eq. 419; *Re Jarman's Estate*, 8 Ch. D. 584.

charitable gift becomes inexpedient or impracticable, the Court will execute them *cy-pres*, *i.e.*, following as nearly as it can the original purpose. This important principle of *cy-pres* is thus expressed by Lord Eldon: "If a testator "has manifested a general intention to give to a charity, "the failure of the particular mode in which the charity is "to be executed shall not destroy the charity; but if the "substantial intention is charity, the law will substitute "another mode of devoting the property to charitable "purposes, though the formal intention as to the mode "cannot be accomplished" (*l*). *Moggridge* v. *Thackwell.*

Thus where a charitable bequest is so given that there can be no objects, the Court will order a new scheme to execute it; or when the specified objects cease to exist, the Court will re-model the charity (*m*). A commonly quoted and striking illustration of this is seen in the case of *Att.-Gen.* v. *The Ironmongers' Co.* (*n*), where there was a bequest of the residue of a testator's estate to a company to apply the interest of a moiety "unto the redemption of British slaves in Turkey or Barbary," one-fourth to charity schools in London and its suburbs, and one-fourth towards necessitated freemen of the company. There being no British slaves in Turkey or Barbary to redeem, the Court directed a master to approve of a new scheme *cy-pres*, and sanctioned a scheme which gave the moiety thus undisposed of to the donees of the other fourth parts (*o*). It does not, however, necessarily follow that where, as in this case, subsisting charities are benefited as well as the one which has ceased to exist, the lapsed fund will be distributed amongst them. In executing the *cy-pres* doctrine the Court has a free hand (*p*). Similarly, where the original scheme has become practically unfeasible owing to a large increase of the fund (*q*), or from

(*l*) *Moggridge* v. *Thackwell*, 7 Ves. 36, 69.
(*m*) *Slevin* v. *Hepburn*, (1891) 2 Ch. 236; 60 L. J. Ch. 439.
(*n*) 2 Beav. 313.
(*o*) Story, 1170 a.
(*p*) *Mayor of Lyons* v. *Adv.-Gen. of Bengal*, 1 App. Cas. 91.
(*q*) *Re Campden Charities*, 18 Ch. D. 310; 49 L. J. Ch. 676.

the fact that the object originally intended has been fully satisfied without exhausting the fund (*r*), the Court will sanction a new scheme for the disposal of the gift. And if the charitable intention is clear, the fact that the particular object is left in uncertainty does not prevent the application of the doctrine (*s*).

All these doctrines proceed upon the same ground; namely, that it is the duty of the Court to effectuate the general intention of the testator; and accordingly the application of them ceases whenever such general intention is not found. If, therefore, it is clearly seen that the testator had one particular object in his mind, as, for example, to build a church at W., and that purpose cannot be answered, the next of kin will take, there being no general charitable intention (*t*). Also, if the charity be of a general, indefinite, or merely private nature, the disposition will be treated as utterly void. In such a case, as the trust is not ascertained, the fund must go either as an absolute gift to the individual selected to distribute it, or to the next of kin: now it being a general principle that if a testator means to create a trust, and does not effectually do so, the trustee may not benefit thereby, the next of kin will in such cases be entitled (*u*).

Particular charitable design distinguished from general.

(v.) In further aid of charities, the Court will supply all defects of conveyances where the donor has a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute. Thus it used formerly to supply the want of a surrender of copyholds, and it has dispensed with a strict compliance with the terms of a power, in neither of which cases would it interfere on behalf of a private object of a voluntary gift.

Defective conveyances remedied.

(*r*) *Pease* v. *Pattinson*, 32 Ch. D. 154; 55 L. J. Ch. 617.

(*s*) *White* v. *W.*, (1893) 2 Ch. 41; 62 L. J. Ch. 342.

(*t*) Story, 1182; *Clark* v. *Taylor*, 1 Drew. 642; *Fisk* v. *Att.-Gen.*, 4 Eq. 521; *Biscoe* v. *Jackson*, 35 Ch. D. 460; 56 L. J. Ch. 540; *Randell* v. *Dixon*, 38 Ch. D. 213; 57 L. J. Ch. 899; *Rymer* v. *Stanfield*, (1895) 1 Ch. 19; 64 L. J. Ch. 86.

(*u*) Story, 1183; *Stubbs* v. *Sargon*, 2 Keen, 255; *Blair* v. *Duncan*, (1902) A. C. 37; *Hannen* v. *Hillyer*, (1902) 1 Ch. 876.

But it would not carry into execution a will not made with the formalities required by the Wills Act (*x*).

(vi.) Charities are not deemed to be within the rule against perpetuities. Thus, a bequest by a testator "for the use and benefit of the poorest of his kindred," was sustained as being a good charity (*y*). But this only applies where there is an immediate gift to the charity. If the gift is contingent upon a future and uncertain event it is subject to the ordinary rule (*z*). If, therefore, an immediate gift to a private individual is followed by an executory gift in favour of a charity, or *vice versâ*, the rule applies, and the contingent gift can only take effect if it certainly falls within the prescribed period (*a*).

As to the treatment by equity of resulting trusts in charitable gifts, see *infra*, p. 75.

Assets not marshalled in favour of charities.

The general favour shown by equity for charities did not, however, go so far as to permit of the marshalling of assets in their favour, since to do so would have infringed the Mortmain Acts. Thus, if a testator dying before August 5th, 1891, gave his real and personal estate to trustees upon trust to sell and pay his debts and legacies and apply the residue to a charity, equity would not marshal the assets by throwing the debts and legacies upon the proceeds of the real estate and chattels real in order to leave the pure personalty for the charity. The fund was appropriated as if no legal objection existed as to applying any portion of it to the charity; and such proportion of the charity legacies failed as in that way fell to be paid out of the prohibited fund (*b*). A testator might,

(*x*) 1 Vict. c. 26; Story, 1171; *Tuffnell* v. *Page*, 2 Atk. 37; *Sayer* v. *S.*, 7 Ha. 377; *Innes* v. *Sayer*, 3 Mac. & G. 606.

(*y*) *Att.-Gen.* v. *D. of Northumberland*, 7 Ch. D. 745; *Gillam* v. *Taylor*, 16 Eq. 581; *Isaac* v. *Defriez*, Amb. 595; *Christ's Hosp.* v. *Grainger*, 1 Mac. & G. 460; *Tyler* v. *T.*, (1891) 3 Ch. 252; 60 L. J. Ch. 686.

(*z*) *Chamberlayne* v. *Brockett*, 8 Ch. 211; *Alt* v. *Lord Stratheden*, (1894) 3 Ch. 265; 63 L. J. Ch. 872.

(*a*) *Lloyd-Phillips* v. *Davis*, (1893) 2 Ch. 491; 62 L. J. Ch. 681.

(*b*) *Hobson* v. *Blackburn*, 1 Keen, 273; *Robinson* v. *Gov. of London Hosp.*, 10 Ha. 19. See *Cornford* v. *Elliott*, 29 Ch. D. 947; 55 L. J. Ch. 332.

however, of course, himself direct his charitable gifts to be paid out of his pure personalty, and the Court was wont to give full effect to such direction (*c*).

But by the Mortmain Act, 1891 (*d*), the former restriction on the devise of lands for charitable uses is removed as to the wills of testators dying after August 5th in that year; but it is provided that lands so devised must be sold within a year from the testator's death, unless the time is extended by the Charity Commissioners or the Court. And where money is given by will, and directed to be laid out in the purchase of land for the benefit of a charity, the gift is good, the direction void. The statute is applicable notwithstanding that the will was dated before the Act (*e*).

V. *Classification of Trusts.*

Lewin's classification.

The leading division of trusts adopted by Mr. Lewin (*f*) distinguishes between those trusts which are created by the act of a party, and those which arise from the operation of law. This classification recommends itself in that it not only calls attention to the very prominent distinction between the different kinds of trusts as regards their creation, but also in that it coincides with an equally prominent distinction in the nature of the trusts themselves. It therefore has all the merit that can be looked for in a classification.

Express trusts.

Trusts which are created by the act of a party are denominated express trusts. Trusts which arise from the operation of law are of two kinds, Resulting Trusts and Constructive Trusts. In certain cases, from the manner

(*c*) *Miles* v. *Harrison*, 9 Ch. 316; *Ravenscroft* v. *Workman*, 37 Ch. D. 637; 57 L. J. Ch. 682.

(*d*) 54 & 55 Vict. c. 73.

(*e*) *Brompton Hosp.* v. *Lewis*, (1894) 1 Ch. 297; 63 L. J. Ch. 186. See *Lewis* v. *Sutton*, (1901) 2 Ch. 640; 70 L. J. Ch. 747.

(*f*) 10th ed., p. 19.

of a party's dealing with his property, equity *presumes an intention* on his part to sever the legal and equitable interests by creating a trust. Such trusts are Resulting Trusts. In other cases, without any reference to the expressed or presumed intention of the parties, equity will, *in order to satisfy the demands of justice and good conscience*, assume the severance of the legal and equitable interests, and create a trust. Such trusts are Constructive Trusts.

Resulting Trusts.

Constructive Trusts.

These three several species of trusts will naturally yield to further analysis as they are separately considered.

It may be well here to state that the trusts above described as Resulting Trusts are by some writers designated Implied Trusts (*g*). The nomenclature here employed is that of Mr. Lewin, by whom the term "implied trusts" is used to describe a sub-division of express trusts, namely those trusts which are created by the use of informal precatory expressions.

Ambiguity of "implied trusts."

(*g*) Snell's Principles of Equity.

Section II.—Express Trusts.

I. *The Creation of the Trust.*
II. *Distinction between Executed and Executory Trusts.*
III. *Voluntary Conveyances and Trusts.*
1. *Gifts.*
2. *Unexecuted intentions to give.*
3. *Voluntary Trusts.*
4. *Statutory Modifications.*
5. *Trusts for Payment of Debts.*

I. *The Creation of the Trust.*

As a general rule, any person who is competent to deal with the legal estate may vest it in a trustee to be held by him subject to the directions of the settlor.

Statute of Frauds. 29 Car. II. c. 3.

1. Before the Statute of Frauds, trusts of every species of property might have been created or transferred by parol; but by that statute (*a*) it was enacted,

s. 7.

"That all *declarations* or *creations* of trusts or confidences "of *any lands, tenements or hereditaments*, shall be mani- "fested, or proved by some writing signed by the party "who is by law enabled to declare such trusts, or by his "last will in writing" (*b*).

s. 9.

"That *all grants and assignments of any trust* or confi- "dence shall likewise be in writing, signed by the party "granting or assigning the same, or by his last will" (*c*).

(*a*) 29 Car. II. c. 3. (*b*) s. 7. (*c*) s. 9.

"Provided always, that where any conveyance shall be s. 8.
"made of any lands or tenements by which a trust or
"confidence shall or may arise or result by the implication
"or construction of law, or be transferred or extinguished
"by an act or operation of law . . . . such trust or con-
"fidence shall have the like force and effect as . . . . if
"this statute had not been made" (*d*).

Scope of the statute.

Thus a trust of freeholds, or of copyholds or of leaseholds, can no longer be created or transferred without a written instrument. A trust of money, even though secured on land (*e*), or of personal chattels, may still be generally created by parol, but cannot be assigned save by a written instrument; and resulting and constructive trusts are unaffected by the Act.

These rules are applicable whatever be the object of the trust, whether it be of a private or public or charitable nature (*f*).

Requires only evidence in writing.

It is to be observed that the statute does not require more than that the trusts within its purview shall be manifested and proved by writing. It is satisfied by *written evidence* of a trust which may not necessarily have been originally declared in writing (*g*). It is necessary, however, that in such cases the evidence should clearly be shown to relate to the subject of the alleged trust (*h*); and not only the fact of the trust, but also the terms of it, must be supported by evidence under signature (*i*).

Formal expressions not required.

2. No particular form of expression is necessary to the creation of a trust, if, on the whole, it can be gathered that a trust was intended. "As a general rule, when property "is given absolutely to any person, and the same person is

(*d*) s. 8.
(*e*) *Peckham* v. *Taylor*, 31 Beav. 250.
(*f*) *Lloyd* v. *Spillet*, 3 P. Wms. 344; 2 Atk. 148.
(*g*) *Forster* v. *Hale*, 3 Ves. 696; *Moorcroft* v. *Dowding*, 2 P. Wms. 314; *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196; 66 L. J. Ch. 74.
(*h*) *Forster* v. *Hale*, *sup.*
(*i*) *Ibid.*; *Smith* v. *Matthews*, 3 De G. F. & J. 139; *Kronheim* v. *Johnson*, 7 Ch. D. 60.

" by the giver, who has power to command, recommended " or entreated, or wished to dispose of that property in " favour of another, the recommendation, entreaty, or wish
The three certainties. " shall be held to create a trust, *first*, if the words are so " used that on the whole they ought to be construed as " imperative; *secondly*, if the subject of the recommenda- " tion or wish be certain; *thirdly*, if the objects or persons " intended to have the benefit of the recommendation or " wish be also certain " (*k*).

Words must be imperative. Illustrations. (1.) *The words must be imperative.*

As illustrating what expressions are deemed to be sufficiently imperative, we find that the words "wish and request" (*l*), "have fullest confidence" (*m*), "heartily beseech" (*n*), "well know" (*o*), "of course he will give" (*p*),
Tendency of the Court. have been so considered. But the leaning of the Court is against construing merely precatory or recommendatory words as creating trusts. Thus, if such expressions as the above are accompanied by other words which indicate an intention that the first taker should have a discretionary power over the subject, or that the donor did not intend the wish to be imperative, no trust will be created (*q*). The tendency of modern decisions is still more pronounced in this direction, and such cases as *Bardswell* v. *B.* and *Robinson* v. *Smith* would very probably not now be followed (*r*). The Court looks at the whole will, and not merely at particular expressions in it, to ascertain the testator's intention (*s*). Thus, in *Re Adams and the Kensington Vestry* (*t*), a gift of real estate "to the abso-

(*k*) *Per* Lord Langdale, *Knight* v. *K.*, 3 Beav. 148, 172; 11 Cl. & F. 513.
(*l*) *Godfrey* v. *G.*, 11 W. R. 554.
(*m*) *Shovelton* v. *S.*, 32 Beav. 143.
(*n*) *Meredith* v. *Heneage*, 1 Sim. 542, 553.
(*o*) *Bardswell* v. *B.*, 9 Sim. 319.
(*p*) *Robinson* v. *Smith*, 6 Mad. 194.
(*q*) *Howorth* v. *Dewell*, 29 Beav. 18; *Benson* v. *Whittam*, 5 Sim. 22.
(*r*) *Lambe* v. *Eames*, 10 Eq. 267; 6 Ch. 597; *Hutchinson* v. *Tenant*, 8 Ch. D. 540; *Parnall* v. *P.*, 9 Ch. D. 96.
(*s*) *Gregory* v. *Edmondson*, 39 Ch. D. 253.
(*t*) 27 Ch. D. 394; 54 L. J. Ch. 87.

lute use of" the testator's wife, "in full confidence that "she would do what was right as to the disposal thereof "between his children, either in her lifetime, or by will "after her decease," was held not to create a trust. The same was held by the House of Lords in a similar case, where the expression used was "feeling confident that she will act "justly to our children in dividing the same when "no longer required by her" (*u*).

Moreover, clear words of gift to a devisee for his own benefit, free from control, will not be cut down by subsequent words which amount to an expression of desire (*x*).

Secret trust enforced on ground of fraud.

A person apparently taking property by devise or bequest from a testator, with the knowledge of the existence of another instrument, which he actually or impliedly undertakes to carry into effect, will be fixed as a trustee with the performance of the directions given in such instrument, when the Court is satisfied that he has fraudulently induced the testator to confide to him the duty which he undertook to perform (*y*). In such cases the existence of fraud induces a departure from the usual rule against allowing any force to a document of a testamentary nature not properly executed. In other words, fraud creates a right to the discovery of secret trusts, notwithstanding the Wills Act (*z*), and such trusts may be proved by parol evidence, notwithstanding the Statute of Frauds (*a*). But if no trust is declared by the will, it is essential in order to make the secret trust binding that it should have been communicated to the devisee or legatee in the testator's lifetime, and that he should accept that particular trust (*b*).

(*u*) *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321; 51 L. J. P. C. 72; and see *Williams* v. *W.*, (1897) 2 Ch. 12; 66 L. J. Ch. 485; *Trench* v. *Hamilton*, (1895) 2 Ch. 370; 64 L. J. Ch. 799; *Hill* v. *H.*, (1897) 1 Q. B. 483; 66 L. J. Q. B. 329.

(*x*) *Meredith* v. *Heneage*, *supra*; *White* v. *Briggs*, 15 Sim. 33.

(*y*) Godefroi on Trusts, p. 79; *McCormick* v. *Grogan*, L. R. 4 H. L. 82; *O'Brien* v. *Tyssen*, 28 Ch. D. 372; 54 L. J. Ch. 284; *Moss* v. *Cooper*, 1 J. & H. 352.

(*z*) *Thynn* v. *T.*, 1 Vern. 295; *Norris* v. *Frazer*, 15 Eq. 318, 330.

(*a*) *Edwards* v. *Pike*, 1 Ed. 267.

(*b*) *Boyes* v. *Carritt*, 26 Ch. D. 531; 53 L. J. Ch. 654; see *Scott* v. *Pitt Rivers*, (1901) 1 Ch. 352; 70 L. J. Ch. 257; (1902) 1 Ch. 403.

(2.) *The subject-matter must be certain.*

Subject must be certain.

Thus where a testator devised real property to his wife to be sold for the payment of his debts and legacies in aid of his personal estate, and added that he "did not doubt but his wife would be kind to his children," no trust was created, because no right to any particular part of the estate was conferred (*c*). So in a similar case where the words used were "not doubting, as she has no relations of her own, but that she will consider my near relations should she survive me, as I should consider them myself should I survive her," the result was the same (*d*). Similarly the expressions "well knowing he will remember" certain objects (*e*), "do justice to," or "deal justly and properly with" (*f*), or a recommendation to give "what shall be left at his death" (*g*), or "what he may have saved" (*h*), are considered too indefinite to create a trust (*i*). But such cases must be distinguished from those in which there is a gift over of a legacy, or so much thereof as *shall not have been paid to or received by the legatee.* Such a gift is not void for uncertainty (*k*).

Illustrations.

Objects must be certain.

(3.) *The objects or* cestuis que trust *must be certain.*

In *Harland* v. *Trigg* (*l*), where a testator gave leaseholds to his "brother for ever, hoping he will continue them in the family," Lord Thurlow held that no trust was created, and said: "I take the rule of law to be this, "that two things must concur to constitute these devises, "—the terms and the object. *Hoping* is in contradistinc- "tion to a direct devise; but whenever there are annexed "to such words precise and direct objects the law has con-

(*c*) *Buggins* v. *Yates*, 9 Mod. 122.
(*d*) *Sale* v. *Moore*, 1 Sim. 534; and see *Curtis* v. *Rippon*, 5 Mad. 534.
(*e*) *Bardswell* v. *B.*, 9 Sim. 319.
(*f*) *Pope* v. *P.*, 10 Sim. 1.
(*g*) *Wynne* v. *Hawkins*, 1 Bro. C. C. 179.
(*h*) *Cowman* v. *Harrison*, 10 Ha. 234.
(*i*) See also *Eade* v. *E.*, 5 Madd. 118; *Finden* v. *Stephens*, 2 Ph. 142; *Horwood* v. *West*, 1 S. & S. 387; *Shaw* v. *Lawless*, 5 Cl. & F. 129.
(*k*) *Chaston* v. *Seago*, 18 Ch. D. 218; 50 L. J. Ch. 716; *Johnson* v. *Crook*, 12 Ch. D. 639.
(*l*) 1 Bro. C. C. 141.

"nected the whole together, and held the words sufficient "to raise a trust;—but then the objects must be distinct." Similarly the expression "near relations" (*m*) has been considered too indefinite to create a trust.

Distinction where trust is manifestly intended.

The distinction must, however, be carefully observed between those cases in which, as above, it was held that no trust was created, and therefore the legatee might hold the estate or bequest beneficially, and other cases in which, though the terms are not sufficiently certain and definite to create an effectual trust, it is, nevertheless, *the manifest intention of the testator that there shall be a trust of some kind*, and that the donee shall not take beneficially. It is an unfailing principle that *if a trust is clearly intended, the intended trustee cannot take beneficially.* In *Briggs* v. *Penny* (*n*), Lord Truro said: "If a testator gives upon "trust, though he never adds a syllable to denote the "objects of that trust, or though he declares the trust in "such a way as not to exhaust the property, or though he "declares it imperfectly, or though the trusts are illegal, "still, in all these cases, as is well known, the legatee is "excluded, and the next of kin" or the heir "takes." In *Stead* v. *Mellor* (*o*) it was intimated that the precise words used in *Briggs* v. *Penny* were barely sufficient to indicate a clear intention to create a trust, but the principle above quoted was not questioned.

Then trustee cannot take beneficially.

(4.) *The object of the trust must be lawful.*

Object must be lawful.

The Court will not permit the system of trusts to be directed to any object that contravenes the policy of the law. Thus a trust of personalty cannot be limited to A. and his heirs, nor can it be entailed. If such words are used, they will vest an absolute interest in A. (*p*).

Mortmain Acts, &c.

Similarly, trusts which contravened the Mortmain Acts,

(*m*) *Sale* v. *Moore*, 1 Sim. 534; and see *Blair* v. *Dunean*, (1902) A. C. 37.

(*n*) 3 De G. & Sm. 525; 3 Mac. & G. 546.

(*o*) 5 Ch. D. 225.

(*p*) *Duke of Norfolk's Case*, 3 Ch. Ca. 9; 1 Vern. 164.

whether openly or secretly (*q*), or the law of perpetuities (*r*), or the policy of the law of bankruptcy (*s*), were held void. Nor can property be settled on trust for illegitimate children to be thereafter born (*t*), nor on any trust adverse to religion or morality (*u*), or savouring of simony (*x*).

Court will neither assist *cestui que trust* nor author of the trust.

Where a trust is created for an unlawful or fraudulent purpose, the Court will neither enforce the trust in favour of the parties intended to be benefited, nor assist the settlor to recover the estate (*y*). But if the object be partly lawful and partly unlawful, and the Court can sever the two, it will hold good and execute the lawful part (*z*).

3. Power in the nature of a trust.

Power in nature of a trust.

In addition to the cases in which upon words of recommendation a trust simply has been held to be created, there is another class of cases in which *powers* are given to persons, accompanied with such words of recommendation in favour of certain objects, as to invest them with the nature of trusts; so that if the donees fail to exercise such powers in favour of the specified objects, the Court will take upon itself to a certain extent the duties of the donees.

Executed by the Court.

When.

In order to induce the Court so to do there must be something more than a mere power of disposing (*a*); but if there appears, in connexion with the words creating the power, "a general intention in favour of a class, and a particular intention in favour of individuals of that class to "be selected by another person, and the particular inten-

(*q*) *Way* v. *East*, 2 Drew. 44; *Stickland* v. *Aldridge*, 9 Ves. 510.
(*r*) *D. of Norfolk's Case*, 3 Ch. Ca. 9.
(*s*) *Graves* v. *Dolphin*, 1 Sim. 66; *Higinbotham* v. *Holme*, 19 Ves. 88.
(*t*) *Medworth* v. *Pope*, 27 Beav. 71.
(*u*) *Thornton* v. *Howe*, 31 Beav. 14.
(*x*) *Cowper* v. *Mantell*, 22 Beav. 231.
(*y*) *Cottington* v. *Fletcher*, 2 Atk. 155; *Haigh* v. *Kaye*, 7 Ch. 473.
(*z*) *Mitford* v. *Reynolds*, 1 Ph. 185; *Re Birkett*, 9 Ch. D. 576; *Vaughan* v. *Thomas*, 33 Ch. D. 187; *Bird* v. *Lee*, (1901) 1 Ch. 715; 70 L. J. Ch. 444.
(*a*) *Brown* v. *Higgs*, 8 Ves. 561, 570; *Re Weekes' Settlement*, (1897) 1 Ch. 289; 66 L. J. Ch. 179.

" tion fails from that selection not being made, the Court " will carry into effect the general intention in favour of " the class " (*b*). In such a case the power is so given as to make it the duty of the donee to execute it, and the Court will not allow the objects to suffer from his negligence (*c*).

Further, if in such a case a rule is laid down for the guidance of the donees of the power, which they do not act upon, the Court will act upon it, exercising the same judgment as the trustees should have done. In *Gower* v. *Mainwaring* (*d*), the trustees were to give the residue of the property to the testator's friends and relations where they should see most necessity, and as they should see most equitable and just. On the surviving trustee refusing to act, the Court considered that it could follow the rule indicated and judge of the necessity. In the absence of such guidance, the Court would distribute the fund equally among the objects of the trust (*e*) on the principle that *equality is equity*. The same principle was followed in *Salusbury* v. *Denton* (*f*), where a widow was directed to apply on her death part of a fund for a charity, the remainder to be at her disposal among the testator's relations in such proportions as she might be pleased to direct. The fund was equally divided, one-half being devoted to the charity, the other divided amongst the testator's next of kin capable of taking within the Statutes of Distribution.

Distinction where there is no express gift to a class.

There is a distinction which should be noticed between those cases in which there is a gift to a class with a subsequent power of appointment amongst the class, and those in which there is no gift to the class except in or by means of the power; as, for instance, where there is a bequest to a wife for her own benefit, trusting that she will at her decease give and bequeath the same to the children. In

(*b*) *Per* Lord Cottenham, in *Burrough* v. *Philcox*, 5 My. & Cr. 72.
(*c*) *Brown* v. *Higgs*, 8 Ves. 576; 5 My. & Cr. 92.
(*d*) 2 Ves. sr. 87.
(*e*) *Doyley* v. *Att.-Gen.*, 2 Eq. Ca. Ab. 194.
(*f*) 3 K. & J. 529.

the first case, the property vests until the power is exercised in all the members of the class, and in default of appointment they will all take (*g*). The property is, in other words, vested in the whole class, subject to be divested or revested by the exercise of the power. But in the second case, there being no primary gift to the class, that is, no gift to the children in express terms, those only can take in default of appointment who might have taken under an exercise of the power. Thus the issue of a deceased child, in the case given, would not take in default of appointment (*h*).

Time of ascertaining class depends on whether donee has a life interest or not.

It is to be observed that where the donee of the power has a life interest in the fund, the class to take in default of appointment is determined by the state of facts at the death of the donee of the power (*i*). If he has not, it will be determined by the state of facts at the death of the donor of the power (*k*).

II. *Executed and Executory Trusts.*

Distinction between executed and executory trusts.

One of the most important of the sub-classifications of express trusts is that which distinguishes between executed and executory trusts. On this subject the leading authority is the case of *Glenorchy* v. *Bosville* (*l*).

In this case A. devised real estate to his sisters B. and C., their heirs and assigns, upon trust until his granddaughter D. should marry or die to receive the profits, and thereout to pay her £100 a year for her maintenance; the residue to pay debts and legacies, and after payment thereof in trust for the said D.; and upon further trust, that if she

(*g*) *Lambert* v. *Thwaites*, 2 Eq. 151.
(*h*) *Walsh* v. *Wallinger*, 2 Russ. & My. 78.
(*i*) *Harding* v. *Glyn*, 1 Atk. 469.
(*k*) *Cole* v. *Wade*, 16 Ves. 27.
(*l*) Ca. t. Talb. 3; 1 W. & T. L. C. 1.

lived to marry a Protestant of the Church of England, and at the time of such marriage were of the age of 21 or upwards, or, if under that age, such marriage were with the consent of the said B., then to *convey the said estate* with all convenient speed after such marriage to the use of the said D. for life, without impeachment of waste, remainder to her husband for life, remainder to the issue of her body, remainders over. It was held that though D. would have taken an estate tail had it been the case of an immediate devise, yet that the trust being executory was to be executed in a more careful and accurate manner; and that a conveyance to D. for life, remainder to her husband for life, remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.

This case is the foundation of a long series of decisions in which the distinction between *executed* and *executory* trusts is recognised.

Definition of executed trust.

A trust is said to be *executed* when no further act is required to give effect to it, the terms of the trust being completely declared by the instrument creating it; as where an estate is conveyed or devised unto and to the use of A. and his heirs in trust for B. and the heirs of his body.

Executory trust.

A trust is said to be *executory* when some further act must be done by the author of the trust or by the trustees to give effect to it, as in the case of marriage articles, which require a settlement to follow to declare fully the limitations of the trust, or as in the case of a will by which property is devised to trustees *upon trust to settle or convey* in a more perfect and accurate manner.

The distinction between an executed and an executory trust does not rest merely on the fact that the trustee may be required to execute some further instrument to give full effect to his trust. For instance, a mere direction to convey upon *certain specified trusts* will not render those trusts executory, so as to give to a Court of equity the

latitude of construction which we shall see to be applicable in the case of executory trusts. The true distinction depends on the question whether the creator of the trust has been what is called his own conveyancer; whether, that is to say, "he has so defined his intention that you have "nothing to do but to take the limitations he has given "you, and convert them into legal estates," or has left it to the Court to make out from general expressions what his intention is (*m*).

Construction of executed trusts: equity follows the law.

It is clearly established that in the case of executed trusts a Court of equity will construe technical words in the same manner as a Court of law would construe them when applied to legal estates. If, for instance, an estate is vested in trustees and their heirs in trust for A. for life without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of A.'s body, the trust being executed, A. will, according to the rule in *Shelley's* case, take an equitable estate tail, just as he would have taken a legal estate tail in case similar words of limitation had been used in a conveyance direct to himself without the intervention of trustees (*n*).

Construction of executory trusts depends on the instrument creating them.

In cases, however, of executory trusts where something is left to be done—viz., the trusts are left to be executed in a more careful and more accurate manner—a Court of equity does not consider itself bound to construe technical expressions with the same legal strictness. If, from the nature of the instrument or from the circumstances of the case, a contrary intention of the creator of the trust can be ascertained, the Court will, in supplying or directing the further act necessary for the execution of the trusts, mould the trusts according to such intention.

The principle is the same in wills as in articles:

The effects of the distinction between executed and executory trusts are most conspicuous in two classes of

(*m*) *Per* Lord St. Leonards, *Egerton* v. *Brownlow*, 4 H. L. 1, 210.
(*n*) *Wright* v. *Pearson*, 1 Eden, 119; *Austen* v. *Taylor*, *ibid.* 361.

cases: 1. *Those arising under marriage articles.* 2. *Those arising under wills.* It is sometimes represented that these two classes of cases are treated on different principles. This is not strictly true. The principle in both cases is that the executory trusts are to be carried into execution in accordance with the intention of the creator of the trust. The difference between the two cases is that marriage articles from their very nature afford an indication of that intention, which is wanting in the case of a will. In the former the presumed object of the instrument is to make provision for the issue of the marriage; in the latter there is no reason to suppose that a testator intends his beneficiary to take one quantum of interest rather than another, an estate for life rather than an estate in tail or in fee (*o*). If, however, even in the case of a will, it can be ascertained from the language employed that the testator did not mean to use the expressions he has employed in their strict technical sense, the Court in decreeing such settlement as he has directed, that is, in executing the executory trust, will so construe his words as to execute his intention (*p*). The precise nature of the contrast between the two cases will fully appear in the detailed separate consideration of executory trusts under marriage articles and those arising under wills.

viz., to follow the testator's intention;

but in articles the intention may be inferred.

Secus in wills.

I. **Executory trusts under marriage articles.**

If, in articles before marriage, for making a settlement of the real estate of either the intended husband or wife, it is agreed that the same shall be settled upon the heirs of the body of them or either of them, in such terms as would, if construed with legal strictness according to the rule in *Shelley's* case, give either of them an estate tail, and so enable him or her to defeat the provision for the issue by barring the entail, Courts of equity, considering

Construction of articles. Real estate.

(*o*) *Rochford* v. *Fitzmaurice*, 2 Dr. & W. 1.
(*p*) *Blackburn* v. *Stables*, 2 V. & B. 369.

that the special object of the articles is to make provision for the issue of the marriage, will in conformity with the presumed intention of the parties, decree a settlement to be made *upon the husband or wife for life only, with remainder to the issue of the marriage in tail as purchasers* (*q*). When the words "heirs of the body," or "issue," are held to indicate an intention that the issue of the marriage should take as purchasers, a settlement will be decreed in favour of daughters as well as sons; thus the form of the limitation will be to the first and other sons successively in tail, with remainder to the daughters as tenants in common, with cross remainders between them (*r*).

Issue treated as purchasers.

Form of limitation.

Though the principle on which the Courts act in these cases is to make such provision for the issue of the marriage as it shall not be in the power of either parent to defeat, where articles are so framed that the concurrence of *both* parents is requisite in order to defeat the provision for the issue, the Court has refused to interfere, considering that it may have been the intention of the parties to the articles that the husband and wife should *jointly* have such power. And so, where it appears on the face of the articles that the parties themselves knew and made a distinction between limitations in strict settlement, and limitations leaving it in the power of *one* of the parents to bar the issue, a strict settlement of the whole will not be decreed (*s*).

Modifying circumstances.

Where words are used in articles which would, if interpreted strictly, create a joint tenancy among the children of the marriage, equity will decree a settlement upon them as tenants in common, either with provisions for limiting over the shares of any who die under age and without issue (*t*), or for making the interests of the children contingent on their attaining 21, being sons, or being daughters,

Tenancy in common preferred to joint tenancy.

(*q*) *Trevor* v. *T.*, 1 P. Wms. 622; *Streatfield* v. *S.*, ca. t. Talb. 176.

(*r*) *Nandick* v. *Wilkes*, Gilb. Eq. Rep. 114.

(*s*) *Howel* v. *H.*, 2 Ves. sr. 358, 359.

(*t*) *Taggart* v. *T.*, 1 S. & L. 84, 89.

attaining that age or marrying (*u*). But surrounding circumstances may modify the operation of this rule (*x*).

It has been laid down that executory trusts in *post-nuptial* settlements will receive the same construction as executory trusts in wills (*y*).

Same rules apply to post-nuptial settlements.

II. **Executory trusts in wills.**

(1.) As to real property.

Unless the intention of the testator appears from the will itself that he meant the words "heirs of the body," or words of similar import, to be words of purchase, Courts of equity will direct a settlement to be made according to the strict legal construction of those words; but if such an intention is apparent on the face of the will, the Court will give effect to it. The principles involved cannot be better illustrated than by comparing the cases of *Sweetapple* v. *Bindon* (*z*), and *Papillon* v. *Voice* (*a*). In the former, B. gave by will £300 to her daughter Mary to be laid out by her executrix in lands, and settled to the only use of her daughter Mary and her children, and if she died without issue, the land to be equally divided between her brothers and sisters then living. Lord Cowper said that had it been an immediate devise of land, Mary, the daughter, would have been by the words of the will tenant in tail: and in the case of a voluntary devise, the Court must take it as they found it, and not lessen the estate or benefit of the legatee; although upon the like words in marriage articles it might be otherwise. Here there was an executory trust indeed, inasmuch as the executrix was required to execute a settlement to give effect to the testatrix's intention; but, the instrument being a will, which conferred a benefit voluntarily on Mary, there was nothing to

In wills realty construed as at law, unless contrary intention apparent.

What amounts to indication of contrary intention.

(*u*) *Young* v. *Macintosh*, 13 Sim. 445; *Cogan* v. *Duffield*, 2 Ch. D. 44, 50.

(*x*) *In re Bellasis' Trust*, 12 Eq. 218.

(*y*) *Rochford* v. *Fitzmaurice*, 1 C. & L. 158; 2 Dr. & W. 1, 19.

(*z*) 2 Vern. 536.

(*a*) 2 P. Wms. 471.

lead one to suppose that a lesser quantum of interest rather than a greater was intended to be conferred: therefore the Court had no ground for attributing to the words used any other than their strict legal meaning (*b*). In *Papillon* v. *Voice*, A. bequeathed a sum of money to trustees in trust to be laid out in a purchase of lands and *to be settled* on B. for life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B., remainder over, with power to B. to make a jointure; and by the same will A. *devised lands* to B. for his life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to support contingent remainders, remainder to the heirs of the body of B., remainder over. Lord Chancellor King declared as to that part of the case where lands were devised to B. for life, though said to be without impeachment of waste, with remainder to trustees to support contingent remainders, remainder to the heirs of the body of B., this last remainder was within the general rule, and must operate as words of limitation, and consequently create a vested estate tail in B.; but as to the other point, he declared the Court had a power over the money directed by the will to be invested in land, and that the diversity was where the will passed a legal estate, and where it was only executory, and the party must come to the Court in order to have the benefit of the will; that in the latter case the intention and not the rules of law must be followed; so that as to the lands to be purchased, they should be limited to B. for life, with power to B. to make a jointure, remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male successively, remainder over. It will be observed that the great distinction between this case and *Sweetapple* v. *Bindon* lay in the fact, that here the testator had divided his lands with which he intended to

(*b*) *Seale* v. *S.*, 1 P. Wms. 290.

benefit B. into two parcels, one of which he devised to B. on certain limitations which were construed legally to carry an estate tail, and the other of which he directed to be settled on B. on the same limitations. This division afforded an index to the testator's intention, for there could have been no object in it if the limitations of both parcels were to be interpreted in the same way. There was here, therefore, an indication of intention which was lacking in *Sweetapple* v. *Bindon;* and therefore the executory trust was interpreted, not strictly, as in that case, but in a manner similar to that in which it would have been treated had it occurred in marriage articles.

Particular expressions.

There are many ways in which a testator may so indicate his intention as to lead the Court in construing an executory trust to depart from the strict legal signification of the words he employs; for instance, by instructing trustees to take "special care in such settlement that it shall not be in the power of A. to dock the entail of the estate given to him during his life" (*c*), or by directing that the heirs of the body or issue shall take "in succession or priority of birth," or that the settlement shall be made "as counsel shall advise," or "as executors shall think fit" (*d*); or again, "in such manner and form as that if A. should happen to die without leaving lawful issue, then that the property might descend after his death unincumbered" (*e*); so where a testator directed a conveyance to his daughter for her life, and so as she alone, or such person as she should appoint, should take the rents and profits, and so that her husband should not intermeddle therewith, and from and after her decease in trust for the heirs of her body for ever, Lord Hardwicke considered that as there was a plain intention to exclude the husband

(*c*) *Leonard* v. *E. of Sussex*, 2 Vern. 526.

(*d*) *White* v. *Carter*, 2 Eden, 366; *Bastard* v. *Proby*, 2 Cox, 6; *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. 543.

(*e*) *Thompson* v. *Fisher*, 10 Eq. 207.

from all benefit, present or future interest, the words "heirs of her body" should be construed as words of purchase, and that the wife was entitled to a life estate only; because otherwise, if the wife predeceased her husband, he would get a considerable benefit contrary to the testator's intention, as tenant by the curtesy (*f*). It requires, however, a stronger case to lead the Court to this interpretation when the word "heirs" is used than it does when "issue" is the term employed, the word "heirs" being naturally a word of limitation (*g*). And where the trusts and limitations of land to be settled are expressly declared by the testator, the Court has no authority to make them different from what they would be at law (*h*).

"Heirs" is a stronger word in favour of a legal construction than "issue."

In wills, as in marriage articles, when the words "heirs of the body" or "issue" are construed as words of purchase, they will be held to include daughters as well as sons, and the settlement will be decreed to be made in default of sons and their issue upon daughters as tenants in common in tail general, with cross remainders between them (*i*); and although, in the ordinary construction of a gift by will to a wife and children, they would take as joint tenants (*k*), where there has been a direction to secure the fund for the benefit of the wife and children, the Court has inferred an intention that the fund should be settled in the usual manner upon the wife for life, remainder to her children (*l*).

Daughters favoured equally with sons.

Children succeed to parents, rather than take as joint tenants.

Where in a *will* there are directions for a settlement in terms which are ordinarily construed to create a joint tenancy, the Court has no authority, as in the case of marriage articles, to vary them in execution by giving a tenancy in common in the settlement unless there is something to indicate that such was the intention (*m*).

(*f*) *Roberts* v. *Dixwell*, 1 Atk. 607.
(*g*) *Meure* v. *M.*, 2 Atk. 265.
(*h*) *Austen* v. *Taylor*, 1 Eden, 361.
(*i*) *Bastard* v. *Proby*, 2 Cox, 6; *Trevor* v. *T.*, 13 Sim. 108; 1 H. L. 239.
(*k*) *Newill* v. *N.*, 7 Ch. 253, 256.
(*l*) *Combe* v. *Hughes*, 14 Eq. 415.
(*m*) *Marryat* v. *Townly*, 1 Ves. sr. 102; *Synge* v. *Hales*, 2 Ba. & Be. 499.

(2.) As to personalty.

Personalty usually vests absolutely at birth.

Where chattels are given by will, and directed to go by reference to limitations of real estate in strict settlement or as heirlooms, either simply or "as far as the rules of law and equity will permit," Courts of equity will not, even though the legal estate be in executors, construe the trusts of the will as executory, so as to prevent the chattels vesting absolutely in the first tenant in tail upon his birth (*n*).

Contrary intention followed if expressed.

But if a plain intention be expressed that no person shall take the chattels absolutely who does not live to become entitled to the possession of the real estate, the Court will execute that intention (*o*). In a recent case a distinction was drawn between a bequest of specific chattels to E., "to be enjoyed and go with the estate," and a bequest of other chattels to trustees on trust to select and set aside certain of them "for the said E. and his successors to be held and settled as heirlooms and to go with the title." There was held to be an executory trust of the latter, but not of the former chattels (*p*).

III. **The doctrine of cy-pres.**

Execution *cy-pres*.

Where an executory trust in articles or in a will if carried literally into effect would be void for illegality, as by infringing the rule against perpetuities, the Court will, in order to carry the testator's intention into effect as far as possible, apply the principle of *cy-pres*, and direct a settlement to be made as strictly as the law will permit (*q*).

(*n*) *Foley* v. *Burnell*, 1 Bro. C. C. 274; *Harrington* v. *H.*, L. R. 5 H. L. 87.

(*o*) *Potts* v. *P.*, 1 H. L. 671.

(*p*) *Cockerell* v. *E. of Essex*, 26 Ch. D. 538; 53 L. J. Ch. 645; and see *Hill* v. *H.*, (1897) 1 Q. B. 483; 66 L. J. Q. B. 329.

(*q*) *Humberston* v. *H.*, 1 P. Wms. 332; and see *Hampton* v. *Holman*, 5 Ch. D. 183; *Miles* v. *Harford*, 12 *ibid.* 691.

III. *Voluntary Conveyances and Trusts.*

The questions which arise in connexion with gifts, conveyances, and declarations of trust which are unsupported by consideration, are so numerous and so important as to require separate and careful investigation.

Distinction between gifts, unexecuted intentions to give, and voluntary trusts.

One of the most important questions which require attention in this connexion is the distinction between a gift, an intention to give which is not completely carried into effect, and the creation of a voluntary trust.

Gifts—

1. First, what is necessary to constitute a complete gift, or *donatio inter vivos ?*

of land,

(1.) In order to effect a gift of lands, it is necessary that the transfer should be effected by deed. A feoffment (unless made under a custom by an infant) is void without this evidence (*r*).

of chattels,

(2.) As to a gift of chattels, the best opinion seems to be that it must either be perfected by delivery of possession, or evidenced by deed (*s*). A mere verbal gift of a chattel to a person in whose possession it already is, has been held not to pass any property therein (*t*). On the other hand, where the donor has, without manual delivery, in effect transferred the possession, this has been considered sufficient to complete the gift, the conduct of the parties evidencing a change of ownership (*u*). When such a gift is evidenced by deed without delivery, it is complete unless and until disclaimer by the donee (*x*), which may be by parol.

of securities.

(3.) The delivery by the donor to the donee of securities transferable by delivery, with words of gift, and an inten-

(*r*) 8 & 9 Vict. c. 106, s. 3.
(*s*) *Irons* v. *Smallpiece*, 2 B. & Ald. 551, 552.
(*t*) *Shower* v. *Pilck*, 4 Exch. 478.
(*u*) *Flory* v. *Denny*, 7 Exch. 583; *Ward* v. *Audland*, 16 M. & W. 862; *Kilpin* v. *Ratley*, (1892) 1 Q. B. 582.
(*x*) *Siggers* v. *Evans*, 5 E. & B. 367.

tion on both sides to pass the property, constitutes a valid donation (*y*).

(4.) A gift of chattels may be made by a husband to his wife without the intervention of a trustee, but in order to establish an allegation of such a gift there must be clear and distinct evidence corroborative of the wife's testimoney (*z*). The tendency of the Court is to regard slight circumstances as sufficient corroboration of the wife's claim where money which was originally her separate estate has come into her husband's power (*a*). Between husband and wife.

2. *Unexecuted intentions to give.* Unexecuted intentions to give.

There is a marked and important distinction between that class of cases in which a settlor without consideration creates a trust in favour of others, and those in which he has ineffectually attempted by an imperfect gift to confer his whole interest upon volunteers.

(1.) It is clear that a mere expression of intention to divide property with, or to leave it to others, or a mere promise to give, will not be enforced (*b*). The maxim *ex nudo pacto non oritur actio* is as applicable in equity as at law. No action will lie for the execution of an agreement which is not supported by consideration. And further, a consideration merely meritorious will not suffice, so that a voluntary covenant by a father to surrender copyholds to trustees for the benefit of his children was held to be wholly nugatory (*c*). Mere promise not enforced.

(2.) But where the donor has gone farther than that, and has actually taken some steps with a design of transferring his property, which steps are, however, ineffectual at law for that purpose, the question has arisen whether equity ought not in such circumstances to come to the Clear evidence of intention to give will not create a trust.

(*y*) *M'Culloch* v. *Bland*, 2 Giff. 428; *Bromley* v. *Brunton*, 6 Eq. 275; *Hill* v. *Wilson*, 8 Ch. 888.
(*z*) *Grant* v. *G.*, 34 Beav. 623.
(*a*) *Rowe* v. *R.*, 2 De G. & S. 294; *Whittaker* v. *W.*, 21 Ch. D. 657; 51 L. J. Ch. 737.
(*b*) *Dipple* v. *Corles*, 11 Ha. 183; *Lister* v. *Hodgson*, 4 Eq. 30.
(*c*) *Jefferys* v. *J.*, Cr. & Ph. 138; *Green* v. *Patterson*, 32 Ch. D. 95; 56 L. J. Ch. 181.

assistance of the intended beneficiaries, and to give effect to the imperfect legal assignment by treating it as creating a trust of the property in their favour. This question has given rise to a great number of cases which it is not always easy to reconcile, but the general result of which is that *the most clear intention to confer a direct interest will not be sufficient of itself to create a trust in favour of a volunteer.*

Illustrations. *Antrobus* v. *Smith.*

Thus where a person endorsed upon the receipt for one of the subscriptions in the F. & C. Navigation Company, "I hereby assign to my daughter B. all my right, title "and interest of and in the enclosed call, and all other calls "in the F. & C. Navigation Company," but never parted with the paper, the Court refused to hold that a trust was created. He might have assigned the property if he chose, but he did not; and there was no power to compel him to do so. His act amounted to some evidence of intention to transfer the property, but there was a *locus pœnitentiæ* as long as the act was incomplete (*d*).

So where the obligee of a bond signed a memorandum not under seal, which was indorsed upon the bond, and purported to be an assignment thereof without consideration to a person to whom at the same time the bond was delivered, it was held that the gift being not complete, the Court could not give effect to it as a trust (*e*).

There must be an intention to create a trust.

There are indeed some cases which seem to be inconsistent with the above rule, and which indicate an inclination to hold that to amount to a declaration of trust which according to ordinary rules of construction would amount only to an imperfect assignment (*f*). But the more recent and emphatic decision in *Richards* v. *Delbridge* (*g*) follows the more powerful current of authorities, and thus expresses their principle,—"*The true distinction seems to be plain and* "*beyond dispute; for a man to make himself a trustee, there*

Richards v. *Delbridge.*

(*d*) *Antrobus* v. *Smith*, 12 Ves. 39; *Searle* v. *Law*, 15 Sim. 95.

(*e*) *Edwards* v. *Jones*, 1 My. & Cr. 226; *Dillon* v. *Coppin*, 4 *ibid.* 647.

(*f*) *Richardson* v. *R.*, 3 Eq. 686; *Morgan* v. *Malleson*, 10 Eq. 475.

(*g*) 18 Eq. 11.

"*must be an expression of intention* to become a trustee, "*whereas words of present gift show an intention to give over* "*property to another, and not to retain it in the donor's own* "*hands for any purpose, fiduciary or otherwise*" (*h*).

Where a valid legal obligation created, equity will give effect to it.

(3.) Where a voluntary instrument, although effecting no legal transfer of property, creates a valid legal obligation, equity will give effect to it (*i*). Thus where a person covenants, without consideration, to pay a sum of money, if the covenant is complete, and the Court is not called upon to do any act to make it perfect, it will give effect to a trust declared thereupon (*k*). This case is distinguishable from such as *Jefferys* v. *J.* (*l*), in that the Court was there asked to enforce a further act necessary at law to complete the obligation; namely, to surrender the copyholds according to the voluntary covenant.

Imperfect testaments not aided.

Where a paper is of a testamentary character, but invalid from want of proper execution, it cannot be enlarged or converted into a declaration of trust (*m*); and if a testator by will gives property upon trusts afterwards to be declared, he cannot make any valid declaration of such trusts, except by an instrument duly executed as a will or codicil. In the absence of such an instrument, the property would fall into residue (*n*).

Voluntary trusts.

3. *Voluntary trusts.*

(1.) Where the plaintiff's claim rests not on the allegation of a gift, complete or incomplete, but of a trust created in his favour, it is clearly settled that when a trust is actually created, and the relation of *cestui que trust* established, a Court of equity will in favour of a volunteer enforce the execution of the trust against the person

(*h*) See also *Milroy* v. *Lord*, 4 De G. F. & J. 274; *Breton* v. *Woollven*, 17 Ch. D. 416; 50 L. J. Ch. 369; *Griffin* v. *G.*, (1899) 1 Ch. 408; 68 L. J. Ch. 220.

(*i*) *Hall* v. *Palmer*, 3 Ha. 532; *Dawson* v. *Kearton*, 3 Sm. & Giff. 186.

(*k*) *Clough* v. *Lambert*, 10 Sim. 174.

(*l*) Cr. & Ph. 138.

(*m*) *Warriner* v. *Rogers*, 16 Eq. 340, 353.

(*n*) *Johnson* v. *Ball*, 5 De G. & Sm. 85.

creating it and all subsequent volunteers; but it will not on behalf of volunteers interfere for the purpose of establishing the relationship of trustee and *cestui que trust* by creating a trust. The leading authority which expressly decides this point is *Ellison* v. *Ellison* (*o*).

Ellison v. *Ellison.*

The rule is sufficiently simple, but its application is often by no means free from difficulty, as it is frequently a question of much nicety to determine whether or not the relation of trustee and *cestui que trust* has been established.

Voluntary trusts within Statute of Frauds.

It may be well, before considering in detail the cases which illustrate the principle, to remind the reader that voluntary trusts are, equally with others, within the purview of the Statute of Frauds. If lands are concerned, therefore, such trusts must by s. 7 of that statute be evidenced by some writing; but a trust of pure personalty may be validly created by a parol declaration (*p*). In these cases, however, if doubt or difficulty arises respecting the words alleged to have been used, the Court may give weight to the suggestion that the words, not being committed to writing, may not express the deliberate sentiments of the party (*q*).

Narrow distinction between these trusts, and imperfect gifts.

(2.) There seems at first sight to be but a narrow distinction between some cases where equity has given effect to such voluntary trusts, and those cases which have been described as imperfect gifts, in which the Court would not interfere on behalf of the would-be beneficiaries.

In *Fortescue* v. *Barnett* (*r*), J. B. made a voluntary assignment by deed of a policy of assurance effected upon his own life to trustees upon certain trusts, and delivered the deed to one of the trustees. The grantor kept the policy in his own possession, and no notice of the assignment was given to the assurance office. It was held that

(*o*) 6 Ves. 656; 1 W. & T. L. C. 273.

(*p*) *McFadden* v. *Jenkyns*, 1 Ph. 153; *Shenstone* v. *Brock*, 36 Ch. D. 541; 56 L. J. Ch. 923.

(*q*) *Dipple* v. *Corles*, 11 Ha. 183.

(*r*) 3 My. & K. 36.

an enforceable trust was created, since no act remained to be done by the grantor which, to assist a volunteer, the Court would not compel him to do. The facts and the result were similar in *Pearson* v. *Amicable Assurance Co.* (*s*). A comparison of these cases with *Edwards* v. *Jones* and *Richards* v. *Delbridge* (*t*) will show that while they agree in the fact that the act of the grantor was incomplete, they differ in the crucial fact that in the former the steps which were taken tended, though not complete, *to the creation of a trust*, while in the latter the intention evidenced *did not point to a trust at all.* The distinction is, in short, that already quoted from the judgment in *Richards* v. *Delbridge*.

The true distinction.

(3.) There are two ways in which a settlor may deal with his property so as to create an irrevocable trust in favour of volunteers; and they are equally applicable, *mutatis mutandis*, whether his interest in the property is legal or merely equitable.

Two ways of creating a voluntary trust.

(i.) *Ellison* v. *Ellison* establishes that where there has been an actual *bonâ fide* transfer of a legal interest upon trusts declared in favour of volunteers, these trusts will be enforced in equity. It goes further, and is a clear authority for the proposition that the enforcement of the trusts will not be prevented by the fact that the legal estate by accident gets back into the hands of the donor, to whom if it were transferred by the trustees, they would be guilty of a breach of trust (*u*).

i. Transfer of legal interest with trusts declared.

As long, however, as the trusts have not been determined by the settlor, notwithstanding a transfer to trustees, he has a *locus pœnitentiæ*, and may call for a re-transfer of the legal estate, there being no remedy for or equity in the would-be *cestui que trusts* until the declaration of the terms of the intended trust (*x*).

Locus pœnitentiæ as long as trusts are not declared.

(*s*) 27 Beav. 229; see also *Fox* v. *Hawks*, 13 Ch. D. 822; *Baddeley* v. *B.*, 9 Ch. D. 113; *Sewell* v. *King*, 14 Ch. D. 179.

(*t*) *Supra*, p. 56.

(*u*) *M'Donnell* v. *Hesilrige*, 16 Beav. 346.

(*x*) *Re Sykes' Trusts*, 2 J. & H. 415.

ii. Complete assignment of equitable interest.

(ii.) Similarly, if his estate be equitable, and he assigns his equitable interest without consideration, doing all that it is in his power to do to pass the property, the transaction is irrevocable. As to realty a contrary doctrine was indeed expressed in *Bridge* v. *B.* (*y*); but the subsequent case of *Gilbert* v. *Overton* (*z*), supported as it is by other authorities, among them the opinion of Lord St. Leonards (*a*), is to be regarded as of greater weight. As to personalty also, it was formerly held that an assignment under seal of that which did not pass at law by the operation of the assignment itself, unaccompanied by other acts, was no better than a covenant or agreement to assign, and was therefore not enforceable (*b*). But the case of *Kekewich* v. *Manning* (*c*), speaking with the authority of the Lord Justice Knight Bruce and Lord Cranworth, must be considered as in effect overruling it.

iii. Settlor constitutes himself trustee, and declares trusts.

(iii.) On the other hand, it is not necessary, in order to render a trust in favour of volunteers enforceable, that there should have been an actual transfer of the legal interest to trustees. It suffices if the settlor has constituted himself a trustee and declared the trusts (*d*).

iv. Directing trustees to hold on certain trusts.

(iv.) And similarly, if the interest be equitable a valid trust may be created by the owner's direction to the trustees to hold the property in trust for the donee (*e*).

Notice only necessary as against third parties.

Notice to the trustees in whom the legal estate is vested is necessary to protect the donee against third parties (*f*); but the trust is good as against the donor without it (*f*); nor is notice to the *cestui que trust* of the declaration of trust necessary (*g*).

Mistake or fraud vitiates the transactions.

(4.) When in any of these ways a trust is executed in favour of volunteers, it cannot afterwards, without good

(*y*) 16 Beav. 315, 327.
(*z*) 2 H. & M. 110, 117; and see *Nanney* v. *Morgan*, 37 Ch. D. 346; 57 L. J. Ch. 311.
(*a*) Sugd. V. & P. 719, 14th ed.
(*b*) *Meek* v. *Kettlewell*, 1 Ha. 464, 474.
(*c*) 1 De G. M. & G. 176.
(*d*) *Exp. Pye; Exp. Dubost*, 18 Ves. 140, 150.
(*e*) *Ryeroft* v. *Christy*, 3 Beav. 238.
(*f*) *Donaldson* v. *D.*, Kay, 711. See *Hardinge* v. *Cobden*, 45 Ch. D. 470.
(*g*) *Tait* v. *Leithead*, Kay, 658.

cause shown, be disturbed by the settlor (*h*). He is bound by his own act, and his deed will only be set aside on his establishing some good reason for the interference (*i*). The mere absence of a power of revocation in the deed, though the settlor's attention was not called to the fact, is no sufficient reason (*k*). But in case mistake (*l*) or fraud (*m*) can be shown, equity will interfere and rescind the transaction.

The main question to be decided in all the cases is that above quoted from the judgment in *Fortescue* v. *Barnett*, "whether any act remained to be done by the grantor "which, to assist a volunteer, the Court would not compel "him to do." And it should be remarked that this question is considerably affected by several recent statutes by which many kinds of property have been made assignable at law which formerly were not so: *e.g.*, policies of life assurance by 30 & 31 Vict. c. 144, policies of marine assurance by 31 & 32 Vict. c. 86, debts and other legal choses in action by the Judicature Act, 1873, s. 25, sub-s. 6. It may well happen under these statutes that an incomplete assignment will be refused support, which, previous thereto, might have obtained it on the ground that the grantor had done all that he could do at law to pass the property. And it should further be observed that very slight circumstances will be regarded as amounting to a sufficient consideration to induce the Court not to treat a settlement as voluntary (*n*).

Doctrine affected by statutes.

4. *Statutory modifications.*

(1.) By 13 Eliz. c. 5, "all covinous conveyances, gifts, "alienations of lands or goods, whereby *creditors* might be

Fraud on creditors, 13 Eliz. c. 5.

(*h*) *Paul* v. *P.*, 20 Ch. D. 743; 51 L. J. Ch. 839.

(*i*) *Henry* v. *Armstrong*, 18 Ch. D. 668.

(*k*) *Hall* v. *H.*, 8 Ch. 430; see also *James* v. *Couchman*, 29 Ch. D. 212; 54 L. J. Ch. 838.

(*l*) *Manning* v. *Gill*, 13 Eq. 485.

(*m*) *Chesterfield* v. *Janssen*, 2 Ves. sr. 125.

(*n*) See *Hewison* v. *Negus*, 16 Beav. 594; *Re Foster and Lister*, 6 Ch. D. 87.

"in any way disturbed, hindered, delayed, or defrauded of "their just rights," are declared *utterly void;* but the Act is not to extend to any estate or interest in lands, &c., *on good consideration*, and *bonâ fide* conveyed to any person not having notice of such covin.

Fraudulent intent, express or implied.

Hence a voluntary settlement of real or personal property may be set aside by a creditor of the settlor upon his showing an intent on the part of the settlor to delay, hinder, or defraud his creditors. This intent may be actual and express (*o*), or it may be inferred in different ways, as, for instance, by showing that the settlor was insolvent at the time of the settlement, or even that he was largely indebted (*p*), or that after deducting the settled property, sufficient available assets were not left for payment of the debts (*q*). To quote the words of Lord Hatherley in *Holmes* v. *Penny* (*r*), "The settlor must "have been at the time, not necessarily insolvent, but so "largely indebted as to induce the Court to believe that "the intention of the settlement, taking the whole trans- "action together, was to defraud the persons who, at the "time of the settlement, were creditors of the settlor."

When implied.

Extends to future creditors.

It has been decided, however, that the protection of the Act is not limited to those who were creditors "at the time of the settlement." The mere fact of a subsequent insolvency is not indeed sufficient to set aside the settlement (*s*). But a deed designed to defraud future creditors, such as a settlement of all or nearly all his present and future property, especially by a person about to engage in trade, is void as against such creditors (*t*); and a prospective liability under a guarantee has been deemed sufficient

(*o*) *Spirett* v. *Willows*, 3 De G. J. & S. 293.

(*p*) *Townsend* v. *Westacott*, 2 Beav. 340; *Taylor* v. *Coenen*, 1 Ch. D. 636.

(*q*) *Freeman* v. *Pope*, 5 Ch. 538.

(*r*) 3 K. & J. 90.

(*s*) *Re Lane-Fox, Exp. Gimblett*, (1900) 2 Q. B. 508; 69 L. J. Q. B. 722.

(*t*) *Ware* v. *Gardner*, 7 Eq. 317; *Mackay* v. *Douglas*, 14 Eq. 106; *Exp. Russell*, 19 Ch. D. 588; 51 L. J. Ch. 621.

to avoid a settlement which in the event left insufficient assets to meet the guaranteed debt (*u*).

Creditor's remedy lost by acquiescence.

A creditor may, by his concurrence with or acquiescence in a deed voidable under 13 Eliz. c. 5, preclude himself and his representatives from impeaching such deed (*x*), and an inquiry may be directed to ascertain whether any creditors of a settlor had so acquiesced (*y*).

Purchaser from volunteer preferred to creditor.

A *bonâ fide* purchaser from a volunteer under a deed void under the statute will be preferred to the general creditors who have no specific charge (*z*).

Choses in action within the statute.

Choses in action, having since 1 & 2 Vict. c. 110, become available for the payment of debts under an execution, are within the statute (*a*).

Voluntary assurances *pendente lite* set aside.

A voluntary deed executed *pendente lite* for the purpose of defeating any process in the nature of execution will be set aside in equity (*b*); and also a deed executed by one who knows that a decision is about to be pronounced against him (*c*).

Deeds for good consideration, but *malâ fide*.

It is to be observed that a deed founded on good consideration may be declared void under the statute if not made *bonâ fide*. But in such circumstances a stronger case must be made out than in that of a voluntary settlement. An *express* intent to defraud must in fact be proved (*d*). Where there was evidence of an intent to defeat and delay creditors, a settlement made in consideration of marriage was held to be not sustainable, the marriage itself being part of the fraudulent scheme (*e*).

(*u*) *Ridler* v. *R.*, 22 Ch. D. 74; *Exp. Mercer*, 17 Q. B. D. 290; 55 L. J. Q. B. 558.

(*x*) *Olliver* v. *King*, 8 De G. M. & G. 110.

(*y*) *Freeman* v. *Pope*, 9 Eq. 206, 212; 5 Ch. 538.

George v. *Milbanke*, 9 Ves. 190; *Halifax Bank* v. *Gledhill*, (1891) 1 Ch. 31; 60 L. J. Ch. 181; *Re Brall*, (1893) 2 Q. B. 381; 62 L. J. Q. B. 457.

(*a*) *Stokoe* v. *Cowan*, 29 Beav. 637.

(*b*) *Blenkinsopp* v. *B.*, 12 Beav. 568; 1 De G. M. & G. 495.

(*c*) *Barling* v. *Bishop*, 29 Beav. 417; and see *Exp. Mercer*, *supra*.

(*d*) *Harman* v. *Richards*, 10 Ha. 89; *Exp. Ellis*, 2 Ch. D. 798; *Exp. Chaplin*, 26 *ib.* 319; 53 L. J. Ch. 732.

(*e*) *Columbine* v. *Penhall*, 1 Sm. & G. 228; *Bulmer* v. *Hunter*, 8 Eq. 46; *Re Pennington*, 5 Morr. B. 216.

But a deed honestly meant as a family arrangement will be sustained (*f*).

Bankruptcy Act, 46 & 47 Vict. c. 52.

(2.) The Bankruptcy Act, 1883 (*g*), contains provisions still more stringent against voluntary settlements than 13 Eliz. c. 5. By s. 47, which, differing in this respect from the corresponding section of the Act of 1869, includes non-traders as well as traders, any settlement not being (1) a settlement made before and in consideration of marriage; or (2) a settlement made in favour of a purchaser (*h*) or incumbrancer *bonâ fide* and for valuable consideration; or (3) a settlement made after marriage on the wife or children of the settlor of property accrued to him in right of his wife, is void against the trustee in bankruptcy if made within two years previous to the settlor's bankruptcy. And if the settlor becomes bankrupt within ten years after making a voluntary settlement except as above excepted, it will be void unless those claiming under it can prove (1) that the settlor was at the time of making the settlement able to pay all his debts without the aid of the settled property; and (2) that the settlor's interest in the property settled passed to the trustee of the settlement on the execution thereof. Under this statute it has been held that to constitute a *bonâ fide* purchaser, it is sufficient if there be good faith on *his* part, even if the good faith of the settlor be doubtful (*i*); and a voluntary settlement is only void as against the trustee in bankruptcy from the time when his title accrues, so that the title of a *bonâ fide* purchaser from a beneficiary before the bankruptcy is good against the trustee (*k*).

Exceptions in.

Moreover by the same section an ante-nuptial covenant

(*f*) *Golden* v. *Gillam*, 20 Ch. D. 389; 51 L. J. Ch. 503.

(*g*) 46 & 47 Vict. c. 52.

(*h*) *Exp. Hillman*, 10 Ch. D. 622; *Hance* v. *Harding*, 20 Q. B. D. 732; 57 L. J. Q. B. 403.

(*i*) *Mackintosh* v. *Pogose*, (1895) 1 Ch. 505; 64 L. J. Ch. 274.

(*k*) *Re Carter and Kenderdine's Contract*, (1897) 1 Ch. 776; 66 L. J. Ch. 408; *Re Vansittart*, (1893) 2 Q. B. 377; 62 L. J. Q. B. 277; *Re Brall, supra*; overruling *Re Briggs and Spicer*, (1891) 2 Ch. 127; 60 L. J. Ch. 514; and see *Re Tankard*, (1899) 2 Q. B. 57; 68 L. J. Q. B. 670; *Halifax Bank* v. *Gledhill*, (1891) 1 Ch. 31; 60 L. J. Ch. 181.

or contract to sell future property not being property in right of the settlor's wife is void against his trustee in bankruptcy unless the property has been actually transferred pursuant to the contract.

See also s. 48 of the Act as to the avoidance of conveyances in fraudulent preference of creditors (*l*).

(3.) By 27 Eliz. c. 4, it was enacted that every conveyance, grant, charge, lease, limitation of use of, *in, or out of any lands, tenements, or other hereditaments whatsoever*, for the intent and purpose to defraud and deceive such *persons*, &c., *as should purchase* the said lands, or any rent or profit out of the same, should be deemed only against such persons, their heirs, &c., who should so purchase for money or any good consideration the said lands, &c., to be wholly void, frustrate, and of none effect. Fraud on *purchasers*. 27 Eliz. c. 4.

Thus a voluntary settlement of *lands*, including leaseholds, was held void against subsequent purchasers for value from the settlor, including mortgagees (*m*), lessees (*n*), and trustees taking under settlements for valuable consideration (*o*), *even with notice* of the settlement (*p*); and it was no support to a settlement that it was a fair provision for a wife and children (*p*). Volunteers, moreover, could not restrain their settlor from selling the settled estates (*q*). A voluntary conveyance to charity was held not to be within the Act (*r*). It will be observed that this statute, differing from 13 Eliz. c. 5, did not apply to chattels personal or money. Applied to lands only. Who were purchasers.

A conveyance apparently voluntary might be supported by collateral evidence showing a contract for value (*s*).

(*l*) *Exp. Taylor*, 18 Q. B. D. 295; 56 L. J. Q. B. 195; *New* v. *Hunting*, (1897) 2 Q. B. 19; 66 L. J. Q. B. 54; *Sharp* v. *Jackson*, (1899) A. C. 419; 68 L. J. Q. B. 866; *Re Lake*, (1901) 1 Q. B. 710; 70 L. J. K. B. 390.

(*m*) *Dolphin* v. *Aylward*, 4 L. R. H. L. 486.

(*n*) *Lewis* v. *Hopkins*, 9 East, 70, cited.

(*o*) *Watkins* v. *Steevens*, Nels. 160.

(*p*) *Doe* v. *Manning*, 9 East, 59.

(*q*) *Pulvertoft* v. *P.*, 18 Ves. 84; *Buckle* v. *Mitchell*, *ibid.* 100.

(*r*) *Ramsay* v. *Gilchrist*, (1892) A. C. 412; 61 L. J. P. C. 72.

(*s*) *Pott* v. *Todhunter*, 2 Coll. 76; *Townend* v. *Toker*, 1 Ch. 446.

A purchaser could only claim the protection of the statute when he purchased from the settlor himself. A conveyance for value by his heir or devisee did not avail against a *bonâ fide* settlement (*t*); nor did a conveyance for value from one who claimed under a second voluntary settlement (*u*).

Volunteers had no equity on purchase-money.

Where a voluntary settlement of land was avoided by a subsequent sale for valuable consideration, the volunteers had no equity against the purchase-money payable to the settlor (*x*). They would, of course, have had a claim for damages under the settlor's covenant for quiet enjoyment if the settlement contained such a covenant.

Small consideration sufficient to support settlement against purchaser.

It should also here be mentioned that a small and inadequate consideration was sufficient to support a settlement against a purchaser (*y*). Thus, though leaseholds were within the Act, if a person took them subject to onerous covenants, the liability so incurred was deemed a sufficient consideration to support his title against a subsequent purchaser (*z*). It has, however, been held that the principle of this case does not apply as against *creditors* (*a*).

Voluntary Conveyances Act, 1893.

But these decisions under 27 Eliz. c. 4, have now to a large extent become irrelevant and inapplicable, since by the Voluntary Conveyances Act, 1893 (*b*), it has been enacted that no voluntary conveyance of lands, tenements, or hereditaments, whether made before or after the passing of the Act, if in fact made *bonâ fide* and without fraudulent intent, shall hereafter be deemed fraudulent or covinous within the statute of Elizabeth by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said statute by a conveyance made upon any such purchase. But the Act does not

(*t*) *Lewis* v. *Rees*, 3 K. & J. 132.
(*u*) *Richards* v. *Lewis*, 11 C. B. 1035.
(*x*) *Daking* v. *Whimper*, 26 Beav. 568.
(*y*) *Bayspoole* v. *Collins*, 6 Ch. 228, 232.
(*z*) *Price* v. *Jenkins*, 5 Ch. D. 619; *Harris* v. *Tubb*, 42 Ch. D. 79; 58 L. J. Ch. 434.
(*a*) *Ridler* v. *R.*, 22 Ch. D. 74; 52 L. J. Ch. 343; see also *Exp. Hillman*, 10 Ch. D. 622.
(*b*) 56 & 57 Vict. c. 21.

apply in any case in which the author of a voluntary conveyance of any lands has subsequently, but before the 29th day of June, 1893, disposed of or dealt with the same to or in favour of a purchaser for value. A purchase within the meaning of the Act includes a mortgage, a lease, and a settlement for value, as under the previous Act. The effect, therefore, is that a voluntary conveyance of land is now good against a subsequent purchaser for value, even without notice, unless it can be shown that it was really made with fraudulent intent. If such intent is proved, the conveyance will still be void against purchasers as under 13 Eliz. c. 5, it would be void against creditors (*c*).

Consideration of marriage.

There has been much discussion as to the sufficiency and scope of the consideration of marriage; and though by reason of the above statute the question has less importance than formerly, there may still be cases in which it will arise.

Valuable.

Marriage has always been recognized in both law and equity as a valuable consideration; and it is quite clear that an ante-nuptial written agreement, followed by marriage, puts the wife and children of the settlor in the position of purchasers for value (*d*).

Not supporting post-nuptial settlement.

Whether a post-nuptial settlement made in consideration and pursuance of an ante-nuptial *parol* agreement was good as against a subsequent purchaser for value, even with notice, is doubtful (*e*). In the case of such a settlement made without referring to any previous agreement, though a previous agreement had been made by the husband while an infant, it was held that the settlement could not prevail against a subsequent purchaser (*f*), and it is clear that a mere post-nuptial settlement, without any ante-nuptial agree-

(*c*) Prideaux's Conveyancing, ii. 280, ed. 17.

(*d*) *Kirk* v. *Clark*, Prec. in Ch. 275; *Teasdale* v. *Braithwaite*, 4 Ch. D. 85; 5 *ibid.* 630.

(*e*) *Dundas* v. *Dutens*, 2 Cox, 235; *Spurgeon* v. *Collier*, 1 Eden, 55; *Warden* v. *Jones*, 2 De G. & J. 76.

(*f*) *Trowell* v. *Shenton*, 8 Ch. D. 318.

ment, was void against a subsequent purchaser even with notice (*g*), though such a settlement was supported on very slight consideration (*h*). We have seen (*sup.* p. 63) that if the marriage is part of a fraudulent scheme, it will not be treated as valuable consideration. And the Voluntary Conveyances Act, 1893, would not protect such a transaction, *bona fides* being absent.

Scope of the consideration.

As to the scope of the marriage consideration, it has been held not to extend to collaterals, or the children of a future marriage (*i*). But children of a former marriage were held to be entitled as against a subsequent purchaser (*k*); and a limitation in favour of the settlor's illegitimate child, though not itself within the marriage consideration, was sustained in a case where its avoidance would have defeated other limitations which were within the consideration (*l*). But the same principle does not apply in the case of the second marriage of a widower, in favour of his children by the first marriage (*m*). A limitation in favour of collaterals, indeed, has been supported where there has been a party to the settlement who has purchased on their behalf (*n*).

Voluntary settlements only affected as far as necessary for purposes of the statutes.

A voluntary settlement under these statutes is only interfered with as far as the purposes of the statute in question require. It may be void against creditors in one case, or purchasers in the other, but it is, nevertheless, valid against and irrevocable by the settlor or grantor himself. He can not only not set aside the settlement, but he cannot come into a Court of equity to enforce on an unwilling purchaser the specific performance of a contract for sale of an

(*g*) *Butterfield* v. *Heath*, 15 Beav. 408.

(*h*) *Hewison* v. *Negus*, 16 Beav. 594; *Bayspoole* v. *Collins*, 6 Ch. 228; *In re Foster and Lister*, 6 Ch. D. 87. But see *Shurmur* v. *Sedgwick*, 24 Ch. D. 597; 53 L. J. Ch. 87.

(*i*) *Wollaston* v. *Tribe*, 9 Eq. 44; *Johnson* v. *Legard*, 3 Madd. 283. See *Tucker* v. *Bennett*, 38 Ch. D. 1; 57 L. J. Ch. 507.

(*k*) *Newstead* v. *Searles*, 1 Atk. 265; *Clarke* v. *Wright*, 6 H. & N. 849; *Mackie* v. *Herbertson*, 9 App. C. 303.

(*l*) *De Mestre* v. *West*, (1891) A. C. 264; 60 L. J. P. C. 66; disapproving *Clarke* v. *Wright*, *sup.*

(*m*) *Re Cameron and Wells*, 37 Ch. D. 32; 57 L. J. Ch. 69.

(*n*) *Heap* v. *Tonge*, 9 Ha. 104.

estate which he has previously settled (*o*), though the purchaser might so enforce the very same contract against him (*p*). It has, however, been decided that if the purchaser is willing to complete on a good title being shown, the vendor may get a decree (*q*).

Similarly, also, if only a part of the settled estate has been sold, and the settlement is set aside as to that part, it nevertheless remains good as to the remainder (*r*); and where a man by a voluntary deed, void against creditors, conveyed real estate for the benefit of his wife and children and afterwards became bankrupt, the surplus of the estate so settled was held bound by the trusts of the settlement (*s*).

5. *Trusts for the payment of debts.*

Trusts to pay debts.

Voluntary trusts for the payment of debts are of a peculiar character, and being regulated by principles quite distinct from those which have been above discussed, must be considered separately.

Revocable till communicated to creditors,

A legal transfer of property for payment of the debts of the owner, as long as it is not known to or concurred in by the creditors, does not invest creditors with the character of *cestui que trusts*. It is considered merely as a direction to the trustees as to the method in which they are to apply the property vested in them for the benefit of the owner of the property, who alone stands in the relation of *cestui que trust*, and has the exceptional power of being able to *vary or revoke the trusts at his pleasure* (*t*). Until some further step has been taken, the transaction is regarded as amounting to no more than a mandate, as where a man gives money to his servant or agent for the purpose of paying a debt, a proceeding which creates no

(*o*) *Smith* v. *Garland*, 2 Mer. 123.

(*p*) *Daking* v. *Whimper*, 26 Beav. 568; *Trowell* v. *Shenton*, 8 Ch. D. 318.

(*q*) *Peter* v. *Nicolls*, 11 Eq. 391.

(*r*) *Croker* v. *Martin*, 1 Bligh, N. S. 573; 1 D. & C. 15.

(*s*) *French* v. *F.*, 6 De G. M. & G. 95.

(*t*) *Walwyn* v. *Coutts*, 3 Mer. 707; 3 Sim. 14.

right whatever in the creditor. The mere fact, therefore, of the existence of such a deed will not suffice to induce the Court to decree execution of the trust for the payment of debts (*u*). But a provision for the benefit of creditors, which does not come into operation until after the settlor's death, is not revocable by one claiming through the settlor (*x*). And it must be observed that there is a broad distinction between a trust for creditors *generally*, and a trust for particular persons, who happen to be creditors. If in the latter case the relation of trustee and *cestui que trust* is created the case falls within the principle already expounded and the trust is irrevocable (*y*).

or acted upon; not so afterwards.

If, however, a settlement in favour of creditors has been acted upon (*z*), or even if it has been communicated to the creditors, the trust is complete, and can no longer be revoked by the settlor, since the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims which they would not otherwise have exercised, after which it would be unjust to disappoint them (*a*). And if one of the creditors is made trustee for himself and the other creditors, and the assignment has been communicated to him and received his assent, it cannot afterwards be revoked by the assignor (*b*). Again, where property had been conveyed upon trust for payment of debts, to a person who was surety for some of the debts, though the creditors were neither parties nor privy thereto, the trustee was held entitled to retain it until discharged

What is sufficient communication.

(*u*) *Walwyn* v. *Coutts*, 3 Mer. 707; 3 Sim. 14; *Garrard* v. *Lauderdale*, 3 Sim. 1; 2 Russ. & M. 451; *Acton* v. *Woodgate*, 2 My. & K. 492; *Johns* v. *James*, 8 Ch. D. 744.

(*x*) *Fitzgerald* v. *White*, 37 Ch. D. 1, 18; 57 L. J. Ch. 594; *Synnot* v. *Simpson*, 5 H. L. C. 121; *Priestley* v. *Ellis*, (1897) 1 Ch. 489; 66 L. J. Ch. 240.

(*y*) *Smith* v. *Hurst*, 10 Hare, 30; *New* v. *Hunting*, (1897) 2 Q. B. 19; 66 L. J. Q. B. 54; *Sharp* v. *Jackson*, (1899) A. C. 419; 68 L. J. Q. B. 866.

(*z*) *Cosser* v. *Radford*, 1 De G. J. & S. 585.

(*a*) *Acton* v. *Woodgate*, 2 My. & K. 492, 495; *Browne* v. *Cavendish*, 1 Jo. & La. 606.

(*b*) *Siggers* v. *Evans*, 5 E. & B. 367.

from his liability as surety (*c*). If also the trust has been communicated to some creditors, it would seem that it cannot, after their debts are satisfied, be revoked as to the remaining creditors (*d*).

Creditor party to the deed.

Where a creditor is party to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debt due to that creditor, the deed is as to him irrevocable; a valid trust in his favour is created (*e*); and what is true where a single creditor is *cestui que trust*, is of course equally so where there are many such. It suffices also if a creditor is party to a deed, though in another right than as *cestui que trust* for the amount of his debt (*f*). In a case where an assignment was made to a trustee for the benefit of creditors, but no creditor was aware of such assignment, it was held that the trustee might sue in equity against a third party to recover property of the settlor outstanding in such third party (*g*).

Though there is a time limited in the deed within which creditors are directed to execute it, yet if by accident any of them fail to do so, they will not necessarily lose the benefit of the trusts, if they eventually act under or upon the faith of the deed, or acquiesce in it (*h*).

Long delay to execute deed or conduct opposed to the deed bars creditor's claim.

A creditor, however, who for a long time delays (*i*), or who refuses to execute the deed, and does not retract his refusal within the time limited (*k*), and *à fortiori* if he sets up a title adverse to the deed (*l*), will not be allowed to claim the benefit of its provisions. And generally the Court, before it permits a creditor to claim the benefit of a deed, will see that he has performed all the fair conditions of the deed; and if he has taken any step incon-

(*c*) *Wilding* v. *Richards*, 1 Coll. 655.
(*d*) *Griffith* v. *Ricketts*, 7 Ha. 307.
(*e*) *Maekinnon* v. *Stewart*, 1 Sim. N. S. 88.
(*f*) *Montefiore* v. *Brown*, 7 H. L. 241, 266.
(*g*) *Glegg* v. *Rees*, 7 Ch. 71.
(*h*) *Raworth* v. *Parker*, 2 K. & J. 163; *In re Baber's Trusts*, 10 Eq. 554.
(*i*) *Gould* v. *Robertson*, 4 De G. & Sm. 509.
(*k*) *Johnson* v. *Kershaw*, 1 De G. & Sm. 260.
(*l*) *Watson* v. *Knight*, 19 Beav. 369; *Meredith* v. *Facey*, 29 Ch. D. 745.

sistent therewith, he will be deprived of all advantage therefrom (*m*).

Resulting trust of surplus.

As a rule, in the case of a settlement in favour of creditors, if there is a surplus after payment of the debts, it results for the benefit of the settlor or his representatives. But if the deed amounts to an absolute assignment of the property, there can be no surplus, and consequently no resulting trust (*n*).

By s. 4 of the Bankruptcy Act, 1883 (*o*), it constitutes an act of bankruptcy to make a conveyance or assignment of property to a trustee for the benefit of creditors generally; and by the Deeds of Arrangement Act, 1887 (*p*), s. 4, any such deed is void, unless registered as prescribed by the Act, within seven days from its execution. If they comprise lands of any tenure they must also be registered under the Lands Charges Registration Act, 1888 (*q*), and are otherwise void against any purchaser, mortgagee, or lessee.

(*m*) *Field* v. *Donoughmore*, 1 Dru. & W. 227.

(*n*) *Smith* v. *Cooke*, (1891) A. C. 297; 60 L. J. Ch. 607.

(*o*) 46 & 47 Vict. c. 52.

(*p*) 50 & 51 Vict. c. 57.

(*q*) 51 & 52 Vict. c. 51.

Section III. Resulting (or Implied) Trusts.

Definition and Classification.

I. *Parting with Legal and retaining Equitable Interest.*

II. *Purchase in names of Third Persons.*

III. *Exceptions.*

Presumption of Advancement.

IV. *Joint Purchases.*

Definition.

Where the owner of property so deals with it that equity presumes an intention on his part to sever the legal from the equitable or beneficial interest, it gives effect to such presumed intention by applying the principle of trusts. These trusts are termed Resulting (or, by some authors, Implied) trusts.

Classification.

There are two leading classes of resulting trusts. First, where an owner parts with the legal estate by conveyance, devise, or bequest, and equity presumes that he had no intention to part with the equitable interest. Secondly, where a purchaser directs a conveyance of the legal estate to be made to a third person, but equity presumes an intention to acquire the equitable interest for himself.

I. *Resulting trusts where an owner parts with the legal interest intending to retain the equitable.*

On what grounds intention to retain equitable interest is presumed.

The inquiry suggested by this class of cases is, on what grounds the Court will hold that a settlor or testator did not intend to part with the equitable interest.

Express intention.

(1.) Where such intention is expressed.

The clearest case is where an intention not to benefit the grantee, devisee, or legatee is actually expressed upon the instrument which transfers the legal estate.

If no trust specified, it results to settlor

We have already seen that where a trust is evidently intended to be created, the person into whose hands the legal estate is transferred cannot hold it beneficially (p. 41). Thus, where a bequest is made to a person "upon trust," and no trust is declared (*a*), or the trusts declared are too vague to be executed (*b*), or are void for unlawfulness (*c*), or fail by lapse (*d*), the trustee can have no pretence for claiming the beneficial ownership, the whole property being clearly impressed with a trust. In such cases, therefore, the trust will result to the settlor or his representatives, the heir as to realty, the next of kin as to personalty; and the trustee cannot defeat the resulting trust by parol evidence in his favour (*e*).

or his representatives.

Presumed intention.

(2.) Where the intention is presumed.

(i.) It was an ancient and well known principle of equity before the Statute of Uses, that when a feoffment of real estate was made to a person without consideration, the use at once resulted to the feoffer, and in equity he continued to enjoy the beneficial interest. The same principle is still applicable, but, as we shall see, upon somewhat different terms from those which were anciently regarded with respect to uses. Formerly, a consideration, however trifling, was sufficient to entitle the feoffee to the use of the lands of which he was enfeoffed. Modern equity, however, makes a wider inquiry than as to the mere payment or non-payment of a nominal consideration, before it

Resulting uses

contrasted with modern trusts.

(*a*) *Dawson* v. *Clarke*, 18 Ves. 247, 254; *Barrs* v. *Fewke*, 2 H. & M. 60; *Merchant Taylors' Co.* v. *Att.-Gen.*, 6 Ch. 512.

(*b*) *Fowler* v. *Garlike*, 1 R. & M. 232; *Leavers* v. *Clayton*, 8 Ch. D. 584.

(*c*) *Carrick* v. *Errington*, 2 P. Wms. 361.

(*d*) *Ackroyd* v. *Smithson*, 1 Bro. C. C. 503, *et infra*, p. 498 *et seq.*

(*e*) *Langham* v. *Sanford*, 17 Ves. 442; 19 *ib.* 643; *Irvine* v. *Sullivan*, 8 Eq. 673.

decides as to the title to the beneficial enjoyment; and it is especially vigilant to observe any indications of fraud or mistake having affected the transaction (*f*).

Where declared trusts do not exhaust the property.

(ii.) Perhaps the most important class of cases under this head are those in which a settlor conveys property on trusts which do not exhaust the whole property. In such cases generally there will be a resulting trust in favour of the settlor of so much of the property as is unaffected by the trust declared (*g*). The same principle has been applied where a fund raised by subscription is not exhausted by the objects declared (*h*). Cases in which, upon the construction of the deed or from attendant circumstances, no intention to retain any benefit is manifest are distinguishable. In such cases the surplus may, according to circumstances, pass to the Crown as *bona vacantia* (*i*), or may be retained by the first beneficiary (*k*).

Special rules as to charities.

With respect, however, to gifts to charities, there are certain special rules which must be observed (*l*).

No resulting trust where a general intention of charity expressed;

Where a person makes a valid gift, whether by deed or will, and expresses a *general* intention of charity, but either particularises no objects (*m*), or such as do not exhaust the proceeds (*n*), the Court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied.

nor where trusts declared at the

Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the proceeds,

(*f*) *Birch* v. *Blagrave*, Amb. 264; *Lloyd* v. *Spillet*, 2 Atk. 150. As to the doctrine of advancement, see *Dyer* v. *D.*, *infra*, p. 80.

(*g*) *Parnell* v. *Hingston*, 3 Sm. & G. 337, 344; *George* v. *Grose*, (1900) 1 Ch. 84; 69 L. J. Ch. 71; *Patrick* v. *Simpson*, 24 Q. B. D. 128; 59 L. J. Q. B. 7.

(*h*) *Smith* v. *Abbott*, (1900) 2 Ch. 326; 69 L. J. Ch. 539; *Re Printers'*, *&c. Protection Soc.*, (1899) 2 Ch. 184; 68 L. J. Ch. 537.

(*i*) *Cunnack* v. *Edwards*, (1896) 2 Ch. 679; 65 L. J. Ch. 801.

(*k*) *Smith* v. *Cooke*, (1891) A. C. 297; 60 L. J. Ch. 607.

(*l*) Lewin, 10th edit., p. 172.

(*m*) *Att.-Gen.* v. *Herrick*, Amb. 712.

(*n*) *Att.-Gen.* v. *Tonner*, 2 Ves. jr. 1; *Bruty* v. *Mackey*, (1896) 2 Ch. 727; 65 L. J. Ch. 881.

time exhaust the proceeds.

but in consequence of an increase in the value of the estate an excess of income subsequently arises, the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount (*o*).

But trust results where all is not at first disposed of.

But even in the case of a charity, if the settlor do not give the land or the whole rents of the land, but, noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir-at-law (*p*), or if the donee be itself an object of charity (as in the case of a charitable corporation) will belong to the donee subject to the charge (*q*).

Contrast between charge and trust for special purposes.

(iii.) The distinction must be observed between a devise to a person for a particular purpose with no intention of conferring a beneficial interest, and a devise with a view of conferring a beneficial interest, but subject to a particular direction. If a testator gives to A. and his heirs all his real estate charged with his debts, that is a devise which includes a particular purpose, but is not restricted to it. The devisee, therefore, takes the beneficial interest, subject to the debts; but if the testator devises all his real estate to A. and his heirs upon trust to pay his debts, that is a devise solely for a particular purpose, with no intention to confer a beneficial interest. If there be any surplus, therefore, after payment of the debts, it results to the heir of the testator (*r*).

Parol evidence as to deeds *inter vivos* admissible to rebut the presumption.

(3.) This species of resulting trust being dependent upon presumption of law, may be rebutted as to instruments *inter vivos* by parol evidence of the settlor's intention (*s*).

For the extensive class of resulting trusts which depend

(*o*) *Beverley* v. *Att.-Gen.*, 6 H. L. 310.

(*p*) *Att.-Gen.* v. *M. of Bristol*, 2 J. & W. 308.

(*q*) *Beverley* v. *Att.-Gen.*, *sup.*; *Att.-Gen.* v. *South Moulton*, 5 H. L. 1.

(*r*) *King* v. *Denison*, 1 V. & B. 272.

(*s*) *Cook* v. *Hutchinson*, 1 Keen, 42, 50; *Fowkes* v. *Pascoe*, 10 Ch. 343.

upon the doctrine of conversion, and which might in a strict classification be here treated of, see *infra*, p. 498 *et seq.*

II. *Purchases in the Names of Third Persons.*

Where purchaser takes a conveyance in name of a third person. Illustrated.

(1.) The second order of resulting trusts comprises those which arise when a person purchases an estate but takes a conveyance in the name of another person.

The general principle on which they rest may be thus illustrated. Suppose A. advances the purchase-money of a freehold, copyhold, or leasehold estate, and a conveyance, surrender, or assignment of the legal interest in it is made either to B., or to B. and C., or to A., B. and C., jointly or successively; *in all these cases if B. and C. are strangers, a trust will result in favour of A.* The doctrine applies equally to real and personal property (*t*).

In connexion therewith it will be convenient first to consider some important rules of evidence respecting these trusts.

(2.) General rules of evidence.

When parol evidence admissible to prove by whom purchase-money is paid.

(i.) If the advance of the purchase-money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made (*u*), resulting trusts being, by s. 8, expressly excepted from the operation of the Statute of Frauds.

But where the trust does not arise on the face of the deed itself, the parol evidence must prove the fact of the advance of the purchase-money very clearly (*x*); and doubt

(*t*) *Sidmouth* v. *S.*, 2 Beav. 447, 454.

(*u*) *Peachey's case*, Sugd. V. & P. 910, 11th ed.

(*x*) *Gascoigne* v. *Thwing*, 1 Vern. 366; *Willis* v. *W.*, 2 Atk. 71.

has been expressed whether such evidence is admissible after the death of the nominal purchaser (*y*). It is not, however, easy to see how his death affects the principle (*z*). If the nominal purchaser admits the payment of the money by the real purchaser, a trust will doubtless result (*a*); and where he, by answer to a bill, denied such payment, parol evidence was admitted to contradict him (*b*).

In a case in which a defendant purchased an estate in his own name with his own money, and the plaintiff alleged that he did so as agent for him, which the defendant denied, parol evidence tendered by the plaintiff to prove a verbal agreement constituting the agency was rejected, on the ground that such a case was not within the exception of the statute, since no trust there arose by operation of law, but it was sought to raise one by parol evidence of an agreement (*c*). But these decisions have since been overruled as being inconsistent with the principle that the Statute of Frauds is not to be made an instrument of fraud (*d*).

To prove purchase with trust money.

(ii.) Parol evidence is admissible to prove that a purchase has been made with trust money, and upon that being proved a trust will result in favour of the *cestui que trust*, the real owner of the money (*e*).

To show intention of advancement.

(iii.) Since resulting trusts arise from equitable presumption, they may be rebutted by parol evidence which shows an intention in the person advancing the purchase-money that the person to whom the property was transferred should take for his own benefit (*f*); and such an intention existing at the time of the purchase cannot be subsequently altered (*g*). Resulting trusts may also be

Presumption

(*y*) Sandars on Uses, 1, 354, 5th ed.; *Chalk* v. *Danvers*, 1 Ch. Ca. 310.

(*z*) *Lench* v. *L.*, 10 Ves. 511, 517.

(*a*) *Ryal* v. *R.*, 1 Atk. 58.

(*b*) *Gascoigne* v. *Thwing*, 1 Vern. 366.

(*c*) *Bartlett* v. *Pickersgill*, 1 Eden, 515; *James* v. *Smith*, (1891) 1 Ch. 384.

(*d*) *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196; 66 L. J. Ch. 74; *Heard* v. *Pilley*, 4 Ch. 548.

(*e*) *Lench* v. *L.*, *sup.*

(*f*) *Goodright* v. *Hodges*, 1 Watk. Cop. 227; Lofft, 230; *Redington* v. *R.*, 3 Ridg. P. C. 178.

(*g*) *Groves* v. *G.*, 3 Y. & J. 163, 172; *Standing* v. *Bowring*, 27 Ch. D. 341; 31 *ib.* 282; 55 L. J. Ch. 218.

rebutted as to part and prevail as to the other part, as where an intention is proved to confer a life interest on the nominee (*h*). rebutted in part.

(iv.) Parol evidence of interested parties is admissible to rebut a resulting trust, but in order to be sufficient for that purpose it must be at least corroborated by surrounding circumstances (*i*). Evidence of interested parties.

(v.) The presumption of a resulting trust will be rebutted by acquiescence for a considerable time in the enjoyment of the property by the person in whose name it was purchased (*k*). Acquiescence.

(vi.) And where there is an express trust declared upon a purchase made in names of strangers, though but by parol, there can be no resulting trust; for resulting trusts, though excepted from the Statute of Frauds, were only left as they were before the Act, and a bare parol declaration before the Act would have prevented any resulting trust (*l*). Express trust evidenced.

III. *Exceptions from the General Rule in such Purchases.*

1. There will be no resulting trust where the policy of an Act of Parliament would be thereby defeated. Thus it was held that no trust resulted in favour of a person advancing the purchase-money of a ship registered in the name of another, for the register, according to the policy of the old Registry Acts, was conclusive evidence of ownership both at law and in equity (*m*). Where it would contravene an Act of Parliament.

(*h*) *Lane* v. *Dighton*, Amb. 409; *Fowkes* v. *Pascoe*, 10 Ch. 343.
(*i*) *Fowkes* v. *Pascoe*, *sup.*
(*k*) *Delane* v. *D.*, 7 Bro. P. C. 279; *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.
(*l*) *Bellasis* v. *Compton*, 2 Vern. 294; *Ayerst* v. *Jenkins*, 16 Eq. 275.
(*m*) *Exp. Gallop*, 15 Ves. 60, 68; but see *Holderness* v. *Lamport*, 29 Beav. 129.

On a similar principle, a trust will not, it seems, result in favour of a person who has purchased an estate in the name of another in order to give him a vote in electing a member of Parliament (*n*). Where, moreover, a person having deposited moneys in a savings bank up to the full amount allowed by statute, made further deposits to an account in his own name in trust for his sister, giving her no notice of the investment, it was held that the only intention being to evade the Act of Parliament, no trust was created, and the claim of the sister was refused (*o*).

2. Presumption of Advancement.

Presumption of advancement.

A more important class of cases is that which springs from the doctrine of advancement. On this a leading authority is *Dyer* v. *Dyer* (*p*).

In this case copyholds were granted to A. and B. his wife and C. his younger son to take in succession for their lives and the life of the survivor. The purchase-money was all paid by A. Nevertheless C. being a son of A. was held not to be a trustee of his life interest for A., but to take beneficially, *the presumption being that the purchase was intended by the father to effect an advancement of the son.*

General rule in favour of children,

(1.) The general rule applying equally to real and personal property is that where a purchase is made in the name of a child there will *primâ facie* be no resulting trust for the parent, but, on the contrary, a presumption arises that an advancement was intended. For this *Dyer* v. *Dyer* is a very strong authority, since there the purchaser had given some indication of an intention contrary to advancement by having actually devised the purchased property (*q*).

or where donor stands *in loco parentis*,

(2.) The presumption of advancement arises not only in favour of children, but also in that of persons towards

(*n*) *Groves* v. *G.*, 3 Y. & J. 163, 175.

(*o*) *Field* v. *Lonsdale*, 13 Beav. 78.

(*p*) 2 Cox, 92; 1 W. & T. L. C. 223.

(*q*) *Finch* v. *F.*, 15 Ves. 43; *Sidmouth* v. *S.*, 2 Beav. 454.

whom the purchaser has put himself *in loco parentis*. Thus an illegitimate child (*r*), a grandchild (*s*), and the nephew of a wife (*t*), and many others in similar circumstances, have been held entitled to the benefit of property purchased in their name. In the case of a grandchild, however, it is important to inquire whether his father is living, as it has been held that if so the *locus parentis* of the grandfather will not avail to raise the presumption (*u*).

or of a wife.

(3.) The presumption also arises in favour of a wife (*x*); and also where there has been a purchase in the joint names of the purchaser, his wife, and a stranger (*y*).

But there is no similar presumption if the purchaser stands merely *in loco mariti*, and has purchased in the name of a woman with whom he has been cohabiting (*z*), or has illegally gone through the form of marrying, such as a deceased wife's sister (*a*).

Not where a mother purchases in the name of a child,

Where a purchase is made by a married woman out of her separate estate in the names of her children, it may be open to question whether, under the present law, there would be deemed to be a presumption of advancement. Previous to the recent Acts relating to married women, it is clear that there was no such presumption (*b*), a mother being then under no legal obligation to provide for her children. And though by the Married Women's Property Act of 1870 (*c*) a married woman having separate property was rendered liable for the maintenance of her children *as a widow was liable*, it was still held that no presumption of advancement arose in the absence of other evidence of such intention (*d*), the liability of the mother being still of a lower nature than that of a father.

(*r*) *Beckford* v. *B.*, Lofft, 490.
(*s*) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.
(*t*) *Currant* v. *Jago*, 1 Coll. 261.
(*u*) *Tucker* v. *Burrow*, 2 H. & M. 515.
(*x*) *Kingdon* v. *Bridges*, 2 Vern. 67.
(*y*) *Re Eykyn's Tr.*, 6 Ch. D. 115.
(*z*) *Rider* v. *Kidder*, 10 Ves. 360.
(*a*) *Soar* v. *Foster*, 4 K. & J. 152; and see *Re A Policy, No.* 6,402, *&c.*, (1902) 1 Ch. 282.
(*b*) *Re De Visme*, 2 De G. J. & S. 17.
(*c*) 33 & 34 Vict. c. 93.
(*d*) *Bennet* v. *B.*, 10 Ch. D. 474.

Now by s. 21 of the Married Women's Property Act, 1882 (*d*), a married woman having separate property is rendered subject to all such liability for the maintenance of her children as *the husband is* by law subject. But the principle of *Bennet* v. *B.* (*e*) would seem to be still applicable, and it is submitted that even now there would be no presumption of advancement. It is doubtful on the authorities whether the doctrine is applicable to the case of a widow (*f*); and certainly if it would not be applied as between a mother and her children, *à fortiori* it would not in the case of a purchase by a wife in the name of her husband. It is, however, most important to observe that in all such cases, if apart from the relationship *an intention to advance is proved*, there is no resulting trust (*g*).

or of a husband.

Vendor must convey to a child if purchase is in his name.

Where a contract is entered into to purchase real property in the name of a child, although the child, being a volunteer, could not sue for specific performance of the contract, nevertheless, if the vendor enforces the contract, the conveyance must be made to the child (*h*). And of course the same principle applies to a wife, and in the case of a joint contract (*i*). But if the father or husband is liable only as a surety for the debt there is no resulting trust (*k*).

Circumstances formerly rebutting the presumption do not so now.

3. Many circumstances have been taken into consideration as rebutting the presumption of advancement; but most of those formerly of weight are not now regarded. Thus at one time the infancy of the child was a circumstance against the purchase being considered an advancement; at present it tells strongly in the opposite direction (*l*).

(*d*) 45 & 46 Vict. c. 75.

(*e*) *Bennet* v. *B.*, 10 Ch. D. 474.

(*f*) *Sayre* v. *Hughes*, 5 Eq. 376; *Batstone* v. *Salter*, 10 Ch. 431; but *cf. Bennet* v. *B.*, *sup.*

(*g*) *Beecher* v. *Major*, 2 D. & Sm. 431.

(*h*) *Redington* v. *R.*, 3 Ridg. P. C. 196.

(*i*) *Drew* v. *Martin*, 2 H. & M. 130; *Vance* v. *V.*, 1 Beav. 605.

(*k*) *Whitehouse* v. *Edwards*, 37 Ch. D. 683; 57 L. J. Ch. 161.

(*l*) *Lamplugh* v. *L.*, 1 P. Wms. 111; *Finch* v. *F.*, 15 Ves. 43.

Again, it was once an argument against advancement that the property purchased was reversionary, and therefore not a proper provision for a child; but this would not now be of any avail (*m*). Lord Hardwicke regarded a purchase in the joint names of the parent and child as a weaker case for advancement than a purchase in the name of a son alone (*n*). Such a circumstance would now have little if any weight. The stranger, in such a purchase, would hold his share in trust for the father; the child would be considered advanced to the extent of his interest (*o*).

Presumption rebutted if child fully advanced.

If a child has been already fully advanced, this affords an objection to the presumption, and the child *may* be held a trustee for its father; but such a circumstance is by no means conclusive (*p*). Partial advancement is of no weight against a child (*q*). It has been sometimes regarded as evidence of the absence of intention to advance, if the father remains in receipt of the rents or profits of the estate or fund purchased. The objection is, however, now without weight, certainly if the child is an infant (*r*), and apparently also if he is adult, unless strengthened by the additional circumstance of his being already fully advanced (*s*).

Advancement void against creditors.

Where an advancement is made by a person largely indebted at the time, it will be void as against creditors under 13 Eliz. c. 5 (*t*); but 27 Eliz. c. 4, had no similar application in favour of purchasers (*u*).

Child solicitor for the parent.

And where the relation of client and solicitor subsists between the parent and child, the ordinary presumption in favour of advancement will be excluded, and the burden

(*m*) *Rumboll* v. *R.*, 2 Eden, 15, 17; *Williams* v. *W.*, 32 Beav. 370.
(*n*) *Pale* v. *P.*, 1 Ves. sr. 76.
(*o*) *Grey* v. *G.*, 2 Swanst. 594, 599; *Dummer* v. *Pitcher*, 2 My. & K. 262, 272.
(*p*) *Hepworth* v. *H.*, 11 Eq. 10.
(*q*) *Redington* v. *R.*, *sup.*
(*r*) *Loyd* v. *Reid*, 1 P. Wms. 688.
(*s*) *Grey* v. *G.*, *sup.*; *Worthington* v. *Curtis*, 1 Ch. D. 419.
(*t*) *Christy* v. *Courtenay*, 13 Beav. 96.
(*u*) *Drew* v. *Martin*, 2 H. & M. 130, 133.

of proving its validity will be thrown on the son acting as solicitor (*x*).

Son may repudiate onerous property.

Where a father makes a purchase in the name of a son, of property which is attended with risk of loss, the Court may on the part of the son repudiate his interest, in which case the father remains liable (*y*).

Unpaid purchase-money payable out of father's assets.

In a case of advancement, where part of the purchase-money remains unpaid, it is a debt payable out of the assets of the father (*z*).

4. Rules of evidence as to presumption of advancement.

Evidence to rebut the presumption.

(1.) The presumption of advancement may be rebutted by evidence of facts showing the father's intention that the son should take the property as a trustee, and not for his own benefit. Such facts must, however, have taken place *antecedently to, or contemporaneously and in immediate connexion with, the same transaction* (*a*). For instance, if there is, on the purchase, an immediate and formal taking possession by the father, as by entering into a shop and putting his name over the door, that would be sufficient to establish ownership in the father and trusteeship in the son (*b*).

Contemporaneous acts of father.

Subsequent acts not admissible.

Subsequent acts, however, are not admissible in evidence against the son's interest. Thus a devise as in *Dyer* v. *Dyer*, or a mortgage (*c*), or other such disposition of the property is of no avail (*d*).

Parol declarations contemporaneous; not subsequent.

(2.) The presumption of advancement may also be rebutted by evidence of parol declarations of the father contemporaneous with the purchase; but not of any declarations made subsequently (*e*).

(*x*) *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244.

(*y*) *Reid's Case*, 24 Beav. 318; *Weston's Case*, 5 Ch. 614.

(*z*) *Skidmore* v. *Bradford*, 8 Eq. 134.

(*a*) *Grey* v. *G.*, 2 Swanst. 594; *Collinson* v. *C.*, 3 De G. M. & G. 409.

(*b*) *Stock* v. *M'Avoy*, 15 Eq. 55, 59.

(*c*) *Bach* v. *Andrew*, 2 Vern. 120.

(*d*) *Murless* v. *Franklin*, 1 Swanst. 13.

(*e*) *Elliott* v. *E.*, 2 Ch. Ca. 231; *Sidmouth* v. *S.*, 2 Beav. 447, 456.

(3.) *A fortiori* parol evidence may be given by the son to show the intention of the father to advance him, such evidence being in support of both the legal interest of the son, and the equitable presumption (*f*). Evidence to support the presumption.

(4.) The acts and declarations of the father subsequent to the purchase, though not admissible in his favour, are admissible against him in favour of the son (*g*), and it seems that subsequent acts and declarations of the son can be used against him by the father; though they would not be sufficient to counteract clear evidence of the father's original intention to advance the son (*h*). Acts and declarations of father subsequent.

(5.) The father may not tender evidence in support of the trust, the effect of which would be to show that the transfer was intended to effect a fraud on the law, such as a conveyance of lands to the son for the purpose of qualifying him for an office or a vote (*i*). Evidence showing fraud on the law not admissible for the father.

(6.) Any surrounding circumstances may be taken into consideration to rebut the presumption of advancement. Thus, where a husband pays money into a bank to an account opened in his wife's name, and it appears that the account was opened for convenience sake, the intention being not to give the wife any interest in the money, but to enable her to act as agent, the money will remain the property of the husband (*k*). In another case, where it was considered that the transfer of the husband's account into the joint names of himself and his wife was made in order to enable the wife to draw cheques, the same conclusion was reached (*l*). Surrounding circumstances considered.

(*f*) *Lamplugh* v. *L.*, 1 P. Wms. 113.

(*g*) *Redington* v. *R.*, 3 Ridg. P. C. 195, 197.

(*h*) *Sidmouth* v. *S.*, *sup.*; *Jeans* v. *Cooke*, 24 Beav. 513, 521.

(*i*) *Childers* v. *C.*, 3 K. & J. 310; *May* v. *M.*, 33 Beav. 81.

(*k*) *Lloyd* v. *Pughe*, 8 Ch. 88; and see *Harvey* v. *Hobday*, (1896) 1 Ch. 137; 65 L.J. Ch. 370.

(*l*) *Marshal* v. *Crutwell*, 20 Eq. 328.

IV. *Resulting Trusts arising from Joint Purchases.*

The principal authority on this species of resulting trusts is *Lake* v. *Gibson*, *Lake* v. *Craddock* (*m*).

In this case five persons purchased an estate as joint tenants in fee, but contributed *unequally* towards the purchase, after which some of them died. They were held to be tenants in common in equity; and though one of the five had deserted the partnership for thirty years, yet he was let in afterwards on terms.

General rule at law.

1. It is an invariable rule at law that when purchasers take a conveyance to themselves and their heirs, they will be joint tenants, and upon the death of one of them the estate will go to the survivor. The judgment of Sir J. Jekyll, in the above case, expresses as clearly as possible how equity regards and treats this rule. "*Equity follows the law*," except where circumstances exist which give rise to the presumption that the parties did not intend the rule of law to apply (*n*). This case shows that an unequal advance of the purchase-money is regarded in equity as such a circumstance. In applying the rule thus stated, it must be remembered that in equity there is a strong leaning against joint tenancy; and it readily seizes on any circumstance from which it can be reasonably implied that a tenancy in common was intended, so that it may hold the survivors of joint purchasers trustees of the legal estate for the representatives of the deceased purchaser.

How viewed in equity.

Leaning against joint tenancy.

Unequal advance of purchase-money.

Sir J. Jekyll qualified the general rule which he laid down by requiring, in order to justify the interference of equity with the rule of law, not only an unequal advance of purchase-money, but also that this should appear from the deed itself. Lord Hardwicke, however, lays down the same rule without this qualification (*o*).

(*m*) 3 P. Wms. 158; 1 W. & T. L. C. 200.

(*n*) *Rigden* v. *Vallier*, 3 Atk. 735; 2 Ves. sr. 258; *Aveling* v. *Knipe*, 19 Ves. 441.

(*o*) *Rigden* v. *Vallier*, *sup.*; *Harrison* v. *Barton*, 1 J. & H. 287, 293.

Joint mortgages.

2. Other circumstances than unequal advances may suffice to raise the presumption that tenancy in common was intended. Perhaps the most important class of such cases are those which arise in what are at law joint mortgages. At law the debt and security belong to the survivor. In equity, *whether the money is advanced equally or unequally, mortgagees are deemed to be tenants in common, and the survivor is held to be a trustee for the personal representatives of the deceased mortgagee* (*p*). And if joint mortgagees purchase or foreclose the equity of redemption, they will still be held in equity tenants in common, on the ground of presumed intention (*q*).

In *Robinson* v. *Preston* (*r*) a similar intention was presumed in the case of a purchase of stock and the opening of a bank account in their joint names by two sisters who resided together. The moneys so dealt with arose from rents of land of which they were tenants in common. On this ground, strengthened by the facts that other moneys similarly arising were invested on mortgage, the deed of which contained a declaration against joint tenancy, and further that the survivor (against whom, of course, her own declaration might be read), by her will, executed in the lifetime of the deceased, spoke of "her share" of the property in question, and affected to dispose of it in favour of her sister, Lord Hatherley declared that the sisters were tenants in common in equity of the stock and bank balance. It should be mentioned, however, that in a somewhat similar, though distinguishable case, Lord Romilly came to a different conclusion (*s*).

Parol evidence admissible to show intention to hold severally.

It seems that parol evidence of *subsequent dealings*, as well as of surrounding circumstances, is, on a purchase by two persons contributing equally, admissible to prove an

(*p*) *Morley* v. *Bird*, 3 Ves. 631.
(*q*) *Rigden* v. *Vallier*, *sup.*
(*r*) 4 K. & J. 505.
(*s*) *Bone* v. *Pollard*, 24 Beav. 283.

intention to hold in severalty; but that such evidence as to *statements of intention* is not admissible (*t*).

3. The principle of resulting trusts is similarly applied to joint purchases made in the way of trade, or in partnership or other commercial transactions. Its operation in such cases will be considered in detail under the head of Partnership (*infra*, p. 624).

(*t*) Compare *Harrison* v. *Barton*, 1 J. & H. 287, and *Devoy* v. *D.*, 3 Sm. & G. 403.

Section IV.—Constructive Trusts.

I. *Definition.*
II. *Renewal of Leases by Trustees.*
III. *Purchase of Trust Property by Trustees.*

I. *Definition and Description.*

Definition.

When on the grounds of justice and good conscience, without reference to the intention of the parties, equity considers the holder of the legal estate to be not entitled to enjoy the equitable or beneficial interest, it treats him as a trustee. Trusts thus created are called Constructive Trusts.

Trustees, &c., gaining advantage from their trust.

The usual circumstances from which these trusts proceed are where a trustee or any person clothed with a fiduciary character seeks to gain some personal advantage by availing himself of his position as a trustee. As soon as such an advantage is acquired through the medium of a trust, the trustee, however good a legal title he may have, will be decreed in equity to hold for the benefit of the *cestui que trust.*

The principle of constructive trusts enters into so many departments of equity, that it is desirable under this especial heading to deal only with some of the leading and most characteristic illustrations of it. In other parts of the work, for instance in considering the remuneration of trustees, and in the chapter on fraud, it will be necessary again to refer to the principle, and further illustrations will be afforded.

The trusts by which effect is given to the liens of vendors and purchasers, though frequently classed as constructive trusts, are of a distinct nature. From their intimate relation to mortgages, we have preferred to deal with them in connexion with that branch of the subject. (See *infra*, p. 326.)

II. *Renewal of Leases by Trustees.*

Renewal of leases by trustees, &c.

Of constructive trusts, one extensive class arises from renewals of leases, in their own names, by trustees and other persons clothed with a fiduciary character. The leading authority among cases of this description is *Keech* v. *Sandford* (*a*), also commonly known as the *Rumford Market Case*.

In this case a person being possessed of a lease of the profits of a market devised his estate to a trustee in trust for an infant. Before the expiration of the term the trustee applied to the lessor for a renewal for the benefit of the infant. This was refused on the ground that, it being only the profits of a market, there could be no distress, and must rest simply in covenant, which the infant could not make. There was clear proof of the refusal to renew the lease for the benefit of the infant. On this refusal the trustee got a lease made to himself. A bill was brought by the infant to have the lease assigned to him, and for an account of the profits. The plaintiff relied on the principle that wherever a lease is renewed by a trustee or executor it shall be for the benefit of the *cestui que use*. The defendant admitted the principle, but denied that it was applicable to this case, because of the proof of an express refusal to renew to the infant. Lord Chancellor King said: "I must consider this as a trust for the infant; for I very well see, if

(*a*) Sel. Ca. in Ch. 61; 1 W. & T. L. C. 46.

"a trustee, on the refusal to renew, might have a lease to "himself, few trust estates would be renewed to a *cestui* "*que use*. Though I do not say there is fraud in this case, "yet the trustee should rather have let it run out than "have had the lease to himself. This may seem hard, "that the trustee is the only person of all mankind who "might not have the lease; but it is very proper that the "rule should be strictly pursued, and not in the least re- "laxed; for it is very obvious what would be the conse- "quences of letting the trustees have the lease on a refusal "to renew to the *cestui que use*."

So it was decreed that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and on account of the profits made since the renewal.

The rule laid down by Lord King has been invariably followed; the ground of the decisions being the public policy of preventing persons in such situations from acting so as to take a benefit to themselves (*b*).

1. As to the persons to whom the doctrine extends.

To whom this doctrine extends.

This doctrine of constructive trusts extends to the general inclusion of all persons standing in a fiduciary relation with respect to the property affected.

Trustees, executors, and administrators.

(1.) The leading case is sufficient authority for its application to express trustees. An executor stands in precisely the same position (*c*). Similarly, an administratrix of a deceased yearly tenant, who obtained a new tenancy from year to year, was held to be trustee thereof for the next of kin of the intestate, though there was no suspicion of fraud (*d*).

Tenants for life.

(2.) Another class, which is the subject of a great number and variety of decisions, is that of tenants for life, or others having a limited interest in renewable leaseholds,

(*b*) *Griffin* v. *G.*, 1 S. & L. 354.
(*c*) *Pillgrem* v. *P.*, 18 Ch. D. 93; 50 L. J. Ch. 834.
(*d*) *Kelly* v. *K.*, 8 I. R. Eq. 403.

who renew the leases in their own names. In these cases they will be held trustees for those entitled in remainder to the old lease (*e*). Thus, in *James* v. *Dean* (*f*), a testator bequeathed leaseholds for years determinable upon lives to his widow (who was his executrix and residuary legatee) for life, with remainder over; the term expired during the testator's life, but he continued to hold as tenant from year to year: the widow obtained a new lease to herself, but it was held to be subject to the trusts of the will, as the residue of the term at the testator's death, however short, would have been. But if the testator had been only a tenant at will, or on sufferance, the case would have been different. Then the tenancy would have been determined by the death of the testator, and thus no interest would have passed by the will to the persons designated to take in remainder, and therefore they could not set themselves up as *cestui que trusts* against the tenant who availed herself of her position to get a renewal in her own name. But Lord Eldon (*g*) was inclined to think that had not the tenant for life in that case been residuary legatee, she would have been held a trustee for the residuary legatee, considering it impossible that the executrix (the life tenant) could hold for herself after availing herself of the position which she held for the benefit of the whole estate for the purpose of procuring the renewal. A renewal, then, under such circumstances, would have the effect of creating an accretion to the general estate (*h*).

Not to a tenant at will.

Although the tenant for life under a settlement be the settlor himself, if he renew in his own name he will be a trustee for the parties interested under the settlement (*i*). The rule is the same if the tenant for life buys the fee simple reversion on a renewable lease (*j*); or exercises, by

(*e*) *Rawe* v. *Chichester*, Amb. 715.
(*f*) 11 Ves. 383; 15 Ves. 236.
(*g*) 11 Ves. 393.
(*h*) Lewin on Trusts, 10th ed., p. 193; *Turner* v. *T.*, 14 Ch. D. 829.
(*i*) *Pickering* v. *Voules*, 1 Bro. C. C. 197.
(*j*) *Phillips* v. *P.*, 29 Ch. D. 673; 54 L. J. Ch. 943; *Re Lord Rane-*

virtue of his ownership, a right of pre-emption over adjoining land (*k*).

Tenant for life receiving payment for not opposing bill in Parliament

Similar in principle to these cases is that in which a tenant for life receives a sum of money for withdrawing his opposition to a bill in Parliament, and the Act then passes authorising the taking of the land in settlement. Whether, then, the land is taken or not, and whether the Act is proceeded upon or not, the money so received must be held for the benefit of all parties interested (*l*).

obtaining a parliamentary title.

In *Cooper* v. *Phibbs* (*m*), Cooper, being in possession of certain estates and a fishery, which he had covenanted to settle, after previous limitations to himself and his issue male, on his brother for life, with remainder to his issue male, procured an Act of Parliament, which, after reciting that the estates and fishery had descended to and were vested in Cooper, and that the said Cooper was desirous of constructing canals, &c., at his own expense, in consideration of the exclusive right of fishery being vested in him, his heirs and assigns, enacted that the said powers to make canals and cuts should be granted to him, provided that the cuts should be altogether situated on the estates and property of the said Cooper. In all the provisions of the Act, Cooper was spoken of as the owner of the estate. Cooper having died without issue male, the House of Lords held that under the Act of Parliament Cooper took the fishery, bound by the trusts of the settlement, Lord Westbury remarking, with characteristic irony: "I must of "necessity assume that Cooper had the intention of stating "the truth and the fact to the Legislature . . . . there- "fore you cannot impute to him that he intended to "conceal the trusts of the settlement. Then if he stood "before Parliament as a trustee, the powers conferred are "conferred upon him in his character as trustee, and

lagh's Will, 26 Ch. D. 590; 53 L. J. Ch. 689; and see *Isaac* v. *Wall*, 6 Ch. D. 706.

(*k*) *Rowley* v. *Ginnever*, (1897) 2 Ch. 503; 66 L. J. Ch. 669.

(*l*) *Pole* v. *P.*, 2 D. & Sm. 420; and see 8 & 9 Vict. c. 18, s. 73.

(*m*) L. R. 2 H. L. 149.

" would be subject to the trusts which affected the donee " of those powers " (*n*).

In accordance with the principle in view the Settled Land Act, 1882, provides that a tenant for life shall, in exercising any power under the Act, have regard to the interests of all parties, and be deemed to be in the position and to have the duties and liabilities of a trustee for those parties (*o*).

Joint tenants. (3.) Joint tenants are subject to a similar equity. If one of several persons jointly interested in a lease renews it in his own name, he will hold it in trust for the others according to their respective shares (*p*). Where a tenant for life, and a remainderman of a lease for lives, took a renewal thereof to themselves as joint tenants, in the absence of anything showing a contrary intention, equity regarded their prior interests as remaining unaltered (*q*). If a person jointly interested with an infant renew, and the renewed lease turn out to be not beneficial, the person renewing must sustain the loss; while if it prove beneficial the infant can claim his share of the benefit, provided that he contribute his due proportion to any sums which may have been paid for the renewal (*r*).

Partners. (4.) So, likewise, if a partner renew a lease of the partnership premises in his own name, he will, as a general rule, be held a trustee of it for the firm (*s*). But this rule has been departed from in certain cases where the business of the partnership in question has been of a speculative nature, such as a mining concern. In such circumstances, when a surviving partner has renewed a lease in his own sole name, and carried on the business with his own capital, the Court has refused to assist the representative of the deceased partner unless he has come forward promptly,

(*n*) See also *Yem* v. *Edwards*, 3 K. & J. 564; 1 De G. & J. 598.
(*o*) 45 & 46 Vict. c. 38, s. 53.
(*p*) *Palmer* v. *Young*, 1 Vern. 276.
(*q*) *Hill* v. *H.*, 8 I. R. Eq. 140.
(*r*) *Exp. Grace*, 1 B. & P. 376.
(*s*) *Featherstonehaugh* v. *Fenwick*, 17 Ves. 298, 311; *Clegg* v. *Fishwick*, 1 Mac. & G. 294; and see now Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 29.

and is ready to contribute a due proportion of money for the purpose of the business; since it would be clearly unjust to let the executor of the deceased partner remain passive while the survivor is incurring all the risk of loss, and only claim to participate after the affairs have proved to be prosperous (*t*). Such a case conspicuously requires the application of the maxims "*Vigilantibus non dormientibus æquitas subvenit*," and "he who seeks equity must do equity." In order, however, to gain the benefit of this exception, the surviving partner must make full disclosure as to the state of the concern, such as will enable the representative to exercise a sound discretion as to the course he ought to pursue (*u*).

Agents.

Similarly, a person acting as agent, or in any similar capacity for a person having an interest in a lease, cannot renew for his own benefit (*x*).

Mortgagee.

(5.) If a mortgagee renew a lease of the mortgage premises, the renewal, whether before or after the expiration of the lease, shall be for the benefit of the mortgagor, on condition of his paying the mortgagee his charges (*y*).

Mortgagor.

Vice versâ, if the mortgagor obtains a new lease or the reversion of the mortgaged property, the new lease or reversion will be held a graft on the old one, for the benefit of the mortgagee (*z*). On the same principle, if a person entitled to a lease which is subject to debts, legacies, or annuities, renews either in his own name, or in that of a trustee, the incumbrances will remain a charge on the renewed lease (*a*).

Volunteers claiming through trustees, &c.

(6.) The same remedies which may be had against trustees, executors, and persons with limited interests, renewing leases in their own names, may also be had

(*t*) *Clements* v. *Hall*, 2 De G. & J. 173.

(*u*) *Ibid.*, 188.

(*x*) *Griffin* v. *G.*, 1 S. & L. 353; *Edwards* v. *Lewis*, 3 Atk. 538.

(*y*) *Rushworth's Case*, Freem. 12; *Rakestraw* v. *Brewer*, 2 P. Wms. 511.

(*z*) *Smith* v. *Chichester*, 2 Dr. & W. 393; *Hughes* v. *Howard*, 25 Beav. 575; *Leigh* v. *Burnett*, 29 Ch. D. 231; 54 L. J. Ch. 757.

(*a*) *Seaborne* v. *Powel*, 2 Vern. 11.

against volunteers claiming through them, and against purchasers from them with notice, express or implied (*b*).

2. The extent and incidents of the doctrine.

These have to some degree been inevitably indicated in reciting the cases which show to whom the doctrine applies. But some further comments are necessary to a full exposition of the matter.

Constructive trustee not treated as an express trustee. Time runs in his favour.

(1.) Though a person in the fiduciary positions described is termed a trustee, he is not in all respects treated like a trustee who is such by virtue of an express trust. The Statute of Limitations will, for instance, run in his favour, against persons claiming the benefit of the constructive trust (*c*). And the *cestui que trust* may, apart from the statute, be bound by acquiescence and lapse of time; especially, as we have seen in partnership cases, where the property sought to be affected with the trust is subject to extraordinary contingencies, or is capable of being rendered productive only by a large and hazardous outlay (*d*). But the defence of the statute is not available in a case of concealed fraud (*e*).

Entitled to indemnity, and lien for outlay on improvements and costs.

(2.) The remaindermen and others who seek the benefit of a constructive trust, are required to indemnify the trustee against any covenants he may have entered into with the lessor (*f*). Moreover, the trustee will have a lien upon the estate for the costs and expenses of renewing the lease, with interest (*g*), and for the costs of *lasting improvements* (*h*), though not for alterations adopted as a

(*b*) *Bowles* v. *Stewart*, 1 S. & L. 209; *Walley* v. *W.*, 1 Vern. 484; *Pillgrem* v. *P.*, 18 Ch. D. 93; 50 L. J. Ch. 834.

(*c*) *In re Dane's Estate*, 5 I. R. Eq. 498; *Knox* v. *Gye*, L. R. 5 H. L. 656, 675; *Met. Bank* v. *Heiron*, 5 Ex. D. 319; *Banner* v. *Berridge*, 18 Ch. D. 254; 50 L. J. Ch. 630; *Evans* v. *Moore*, (1891) 3 Ch. 119; 61 L. J. Ch. 85.

(*d*) *Clegg* v. *Edmondson*, 8 De G. M. & G. 787; *Erlanger* v. *New Sombrero, &c. Co.*, 3 App. Cas. 1218; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, (1899) 2 Ch. 392; 68 L. J. Ch. 699.

(*e*) *Betjemann* v. *B.*, (1895) 2 Ch. 474; 64 L. J. Ch. 641.

(*f*) *Giddings* v. *G.*, 3 Russ. 241.

(*g*) *Rawe* v. *Chichester*, Amb. 715.

(*h*) *Holt* v. *H.*, 1 Ch. Ca. 190; *Walley* v. *W.*, *sup.*; *Lawledge* v. *Tyndall*, (1896) 1 Ch. 923; 65 L. J. Ch. 654; *Rowley* v. *Ginnever*, (1897) 2 Ch. 503; 66 L. J. Ch. 699.

matter of taste or personal convenience (*i*); and of course the lien affects no property outside the trust estate (*j*).

What are improvements. *Dent* v. *D.*

In the case of *Dent* v. *D.* (*k*), the erecting of a conservatory, the re-building of farm-houses, the erecting of cottages and permanent furnaces, works and buildings, and the draining of marshy ground, were held to be not such permanent improvements as to entitle the tenant to a lien on the estate for money so laid out; but an inquiry was directed in the same case as to whether the laying out of money in completing the mansion-house, and in working a foreign mine so as to prevent forfeiture, was or was not for the benefit of the inheritance. But each case must be considered on its own merits in determining the question thus raised; everything may depend on the *bona fides* of the tenant for life, and the particular relation of the alleged improvements to the estate concerned. Under such circumstances there is nothing surprising in a great appearance of conflict in the decisions (*l*).

With the view of avoiding the difficulties and hardship of such cases, various statutes have been passed following in the train of the Improvement of Land Act, 1864 (*m*), affording facilities for the improvement of settled land by means of moneys borrowed from government, and repayable by instalments charged on the land improved. Also by the Settled Land Act, 1882 (*n*), capital moneys under the Act may be laid out in specified improvements as therein provided.

Per contra is chargeable for waste, rents and profits.

On the other hand, charges in the nature of waste and for deterioration must be set off against anything thus found for improvements (*o*); the trustee must account for

(*i*) *Mill* v. *Hill*, 3 H. L. 828, 869.

(*j*) *Re Winchelsea's Policy Moneys*, 39 Ch. D. 168; 58 L. J. Ch. 20.

(*k*) 30 Beav. 363.

(*l*) See *Re Leslie's Settled Trusts*, 2 Ch. D. 185; *Re Leigh's Estate*, 6 Ch. 887; *Re Aldred's Estate*, 21 Ch. D. 228; *Derbishire* v. *Montague*, (1897) 1 Ch. 685; 2 Ch. 8; 66 L. J. Ch. 541; *Conway* v. *Fenton*, 40 Ch. D. 512; 58 L. J. Ch. 282.

(*m*) 27 & 28 Vict. c. 114.

(*n*) 45 & 46 Vict. c. 38, ss. 21, 25; and see 52 & 53 Vict. c. 30, s. 2.

(*o*) *Mill* v. *Hill*, *sup.*

the mesne rents and profits (*p*), such account in the case of a tenant for life of course commencing only from his decease (*q*), and must assign the lease free from incumbrances.

Court is vigilant to prevent evasion.

(3.) The Court is vigilant to prevent any fraudulent evasion of the doctrine of constructive trusts. The case of *Cooper* v. *Phibbs* above commented on is a good illustration of this. Where, therefore, a lessee by collusion with his landlord incurred a forfeiture of his lease, and then obtained a new lease, the trusts of the former were held to attach to the latter (*r*). So if a person who has a right of renewal sells such right, the money produced by the sale will be subject to the same trusts as the leaseholds if renewed would have been (*s*).

Cases of compulsory purchases.

(4.) Where renewable leaseholds are taken by a railway or other company under compulsory powers, a tenant for life will only be entitled to the interest arising from the purchase-money, although the custom to renew may not have ceased until after the premises were thus taken; at any rate, when the primary intention of the settlor appears to have been to create a perpetual estate (*t*).

Renewal impossible; accumulated sums.

(5.) When it is impossible to obtain the renewal of a lease, if there be no predominant trust for renewal overriding the disposition in favour of the subsequent tenant for life, the latter will, it seems, be entitled to the sum accumulated by the direction of the settlor for that purpose (*u*). But where it appears to have been the paramount intention of the testator that those entitled in reversion expectant upon the decease of a tenant for life should succeed to the enjoyment of substantially the same estate, the tenant for life, upon the renewal becoming impracticable, will only be entitled to the income of the sum set

(*p*) *Mulvany* v. *Dillon*, 1 Ball & B. 409.
(*q*) *Giddings* v. *G.*, 3 Russ. 241.
(*r*) *Hughes* v. *Howard*, 25 Beav. 575.
(*s*) *Owen* v. *Williams*, Amb. 734.
(*t*) *Re Wood's Estate*, 10 Eq. 572.
(*u*) *Morres* v. *Hodges*, 27 Beav. 625; *In re Money's Trusts*, 2 D. & Sm. 94.

apart for renewal and of the sum produced by the sale of the leaseholds (*x*).

And where a trustee, or person in a fiduciary position, who has acquired the legal possession of and dominion over an estate, subject to a covenant for perpetual renewal, so deals with the property as by his own act to make the renewal impossible, with a view to his own benefit, he is bound to give full effect to the charges on the trust estate, and to satisfy those charges out of the acquired estate, so far as may be necessary (*y*).

By the Trustee Act, 1893 (*z*), a trustee of renewable leaseholds not only may, if he thinks fit, renew, but may be required by any beneficiary to use his best endeavours to do so; provided that where by the settlement or will the tenant for life or for a limited interest is entitled to enjoy the same without any obligation to renew or contribute to the expense of renewal, his consent in writing is necessary. Any money required for the renewal may be paid by the trustee out of trust moneys in his hands, or may be raised by mortgage of the premises.

III. *Constructive Trusts arising from a Purchase of Trust Property by a Trustee.*

Purchase of trust property by a trustee.

This class of trusts is usually illustrated by reference to the important case of *Fox* v. *Mackreth*, *Pitt* v. *Mackreth* (*a*), in which a mortgagee who purchased the mortgaged property himself by taking an undue advantage of the confidence reposed in him, and sold it at a higher price, was decreed to be a trustee for the mortgagor of the sum produced by this sale.

(*x*) *Maddy* v. *Hale*, 3 Ch. D. 327; *Re Barber's Settled Estate*, 18 *ib.* 624; 50 L. J. Ch. 769.

(*y*) *Trumper* v. *T.*, 14 Eq. 295, 310; 8 Ch. 870.

(*z*) 56 & 57 Vict. c. 53, s. 19.

(*a*) 2 Bro. C. C. 400; 2 Cox, 320; 1 W. & T. L. C. 123.

Statement of the principle.

This case is usually referred to as having established the rule, ever since recognised and acted upon by Courts of Equity, that a purchase by a trustee for sale from his *cestui que trust*, although he may have given an adequate price, and gained no advantage, shall be set aside at the option of the *cestui que trust*, unless the connexion between them most satisfactorily appears to have been dissolved, and unless all knowledge of the value of the property acquired by the trustee has been communicated to his *cestui que trust*. The principle of the rule is, however, more clearly expressed by Lord Eldon in *Ex parte Lacey* (*b*). He says: "It is founded upon this: that "though you may see in a particular case that the trustee "has not made advantage, it is utterly impossible to "examine upon satisfactory evidence, in ninety-nine cases "out of a hundred, whether he has made advantage or not. "Suppose a trustee buys any estate, and by the knowledge "acquired in that character discovers a valuable coal mine "under it, and, locking that up in his own breast, enters "into a contract with his *cestui que trust;* if he chooses to "deny it, how can the Court try that against his denial? "The probability is that a trustee who has once conceived "such a purpose will never disclose it, and the *cestui que* "*trust* will be effectually defrauded." The decision, then, in the principal case, depended not on whether the defendant purchased at an under-value, but on the fact that he purchased it from his *cestui que trust* while that relation continued to subsist and without a full disclosure. There are indeed many passages in Lord Thurlow's judgment which seem to point to the other as the ground of his decision, but as to these he subsequently admitted himself to have been mistaken, and declared the latter to be the true principle. Upon this principle the value was immaterial; for if the original transaction was right, it was of no consequence at what price Mackreth sold the estate

Value given immaterial.

(*b*) 6 Ves. 625, 627.

afterwards; if it was wrong, Mackreth, not having discharged himself from the character of trustee, if an advantage was gained by the most fortuitous circumstance, still it was gained for the benefit of the *cestui que trust*, not of the trustee (*c*). We proceed to consider the application of the principle under the varying circumstances which have occurred in practice.

This inquiry conveniently resolves itself into two divisions. First, What are the limits of the application of the principle? Or, in other words, Is bargaining between a trustee and a *cestui que trust* ever supportable in equity, and if so, when? Secondly, What persons come so far within the definition of a trustee as to be affected by the principle which forbids such transactions? Subsidiary to these questions, it will be advisable to consider the nature of the relief afforded by equity in such cases.

1. The limits of the application of the principle.

Limits of the principle.

Direct private contract.

(1.) The cases already referred to are sufficient authority for the proposition that a trustee for sale cannot by a direct and private contract with his *cestui que trust* become a purchaser of the trust estate. The rule is the same as to both real and personal estate, and, as has been seen, the question is not one of price (though naturally, if an adequate price was given, it would probably not be challenged), but of the position of the parties. Similarly, a trustee can no more take a lease than he can purchase from himself (*d*).

Purchase at auction.

(2.) A purchase by trustees at a public auction will not be sustained; for if persons in such a capacity were present at an auction as bidders, their mere presence would operate as a discouragement to others. The knowledge that certain persons who naturally have superior means of

(*c*) See Lord Eldon's judgment above quoted, and *Exp. Bennett*, 10 Ves. 381, 394.

(*d*) *Att.-Gen.* v. *E. of Clarendon*, 17 Ves. 491, 500; *Passingham* v. *Sherborne*, 9 Beav. 424.

information are bidding must inevitably check competition (*e*).

Purchase through or as an agent,

(3.) Nor is it admissible for a trustee to purchase through an agent, even at an auction (*f*). On the other hand, he is equally disqualified from purchasing as an agent for another person (*g*). A purchase from co-trustees is equally objectionable (*h*).

or from co-trustees.

Retiring from trust on purpose.

(4.) Nor can a trustee be allowed to purchase the trust property, by retiring from the trust with that object in view (*i*). But where a trustee had retired from a trust for several years, and there were no circumstances of doubt or suspicion, a purchase was sustained (*k*).

Purchase under a decree.

(5.) Similarly, it has been held that a trustee cannot purchase before the Master under a decree for sale (*l*).

From trustee in bankruptcy.

(6.) And that he cannot purchase from the trustee in bankruptcy of his *cestui que trust*, under an agreement to divide the profits, more especially if the purchase-money consists of part of the trust funds (*m*).

Fair sale and re-purchase.

(7.) On the contrary, where a trustee has fairly sold an estate, a subsequent *bonâ fide* purchase of the estate from the purchaser is unobjectionable (*n*).

Trust determined and *cestui que trust sui juris*.

(8.) And though a trustee cannot purchase from himself, he can purchase from a *cestui que trust* who is *sui juris* and has discharged him from the obligation which attached upon him as trustee (*o*); but such a transaction is subjected to jealous scrutiny, and must be free from all suspicion of fraud, concealment, or undue advantage on the part of the trustee (*p*). A solicitor of a *cestui que trust* has, in general,

(*e*) *Exp. Lacey*, 6 Ves. 629; *Exp. James*, 8 Ves. 348.

(*f*) *Campbell* v. *Walker*, 5 Ves. 678; 13 Ves. 601; *Ingle* v. *Richards*, 28 Beav. 361.

(*g*) *Exp. Bennett*, 10 Ves. 381, 400; *Gregory* v. *G.*, Coop. 204.

(*h*) *Whichcote* v. *Lawrence*, 3 Ves. 740.

(*i*) *Spring* v. *Pride*, 4 De G. J. & S. 395.

(*k*) *Re Boles, &c. Contract*, (1902) 1 Ch. 244; *Clark* v. *C.*, 9 App. Cas. 733; 53 L. J. P. C. 99.

(*l*) *Cary* v. *C.*, 2 S. & L. 173.

(*m*) *Vaughan* v. *Noble*, 30 Beav. 34.

(*n*) *Baker* v. *Peck*, 9 W. R. 472; *ib.* 186; *Dover* v. *Buck*, 5 Giff. 57.

(*o*) *Coles* v. *Trecothick*, 9 Ves. 234; *Exp. Lacey*, *sup.*

(*p*) See *Morse* v. *Royal*, 12 Ves.

no authority to consent to a purchase by a trustee (*q*); but a purchase has been allowed in a friendly suit by the trustees of a settlement from a surviving trustee who was a solicitor, and who acted in conduct of the purchase (*r*).

Purchase with leave of Court.

(9.) A trustee for infants, moreover, or persons under disability, may sometimes purchase the trust estate, by leave of the Court. Such *cestui que trusts* not being *sui juris* could not enter into any contract by which to release him from the character of trustee; but where an action has been commenced, and the Court has fully examined the circumstances of the case, and a trustee, saying so much is bid, offers to give more, permission may be given to the purchase (*s*).

Leave when given.

Property unconnected with the trust.

(10.) The existence of the relation of trustee and *cestui que trust* does not affect any dealing between the parties as to property entirely unconnected with the subject of the trust (*t*).

Acquiescence of *cestui que trust*.

(11.) A *cestui que trust* who wishes to set aside a sale, must apply within a reasonable time, which depends upon the circumstances of each particular case (*u*). He may lose his right to impugn the transaction by long acquiescence (*x*), such acquiescence being taken as evidence that as between the trustee and *cestui que trust* the relation had been abandoned in the transaction (*y*). And acquiescence may be evidenced by other circumstances than mere lapse of time (*z*).

Conditions of.

In order, however, to fix acquiescence on a party, it should be unequivocally shown that he knew the fact upon which the supposed acquiescence is founded, and to which it refers (*a*). Time will in general not run against a

355; *Franks* v. *Bollans*, 3 Ch. 717; *Williams* v. *Scott*, (1900) A. C. 499; 69 L. J. P. C. 77.

(*q*) *Downes* v. *Grazebrook*, 3 Mer. 209.

(*r*) *Hickley* v. *H.*, 2 Ch. D. 190.

(*s*) *Campbell* v. *Walker*, 5 Ves. 678, 682; 13 Ves. 601; *Farmer* v. *Dean*, 32 Beav. 327.

(*t*) *Knight* v. *Marjoribanks*, 2 Mac. & G. 10.

(*u*) *Campbell* v. *Walker*, *sup.*

(*x*) *Morse* v. *Royal*, *sup.*

(*y*) *Parkes* v. *White*, 11 Ves. 226; *Seagram* v. *Knight*, 3 Eq. 398; 2 Ch. 628.

(*z*) *Wright* v. *Vanderplank*, 2 K. & J. 1.

(*a*) *Randall* v. *Errington*, 10 Ves. 423, 428.

party so long as his interest is contingent or reversionary (*b*), nor as long as he remains ignorant of his title to relief.

Confirmation. (12.) A *cestui que trust* when *sui juris* may confirm an invalid sale so that it cannot be afterwards set aside (*c*).

Conditions of. But in order to constitute a valid confirmation, a person must be aware that the act he is doing will have the effect of confirming an impeachable transaction (*d*). Nor will the confirmation be valid if done in circumstances of distress or difficulty, or under the force or pressure and influence of the previous transaction (*e*). It must, of course, be an act separate from the impeachable transaction.

2. To what persons the principle applies.

Principle applies to express trustee. (1.) The strongest case is where the would-be purchaser is an express trustee. In the principal case Mackreth was invested with the office directly by means of a trust deed, which created the relation for the express purpose of giving a power of sale; and nothing is more firmly established than that in such and such-like cases a trustee will not be suffered to purchase from himself (*f*).

Not nominal trustee. A mere nominal trustee, however, for instance, one who has disclaimed without ever acting in the trust, or a trustee to preserve contingent remainders, may become a purchaser (*g*).

Mortgagee. (2.) A mortgagee or an annuitant with a power of sale, being in fact a trustee for sale, cannot, either directly or by his solicitor or agent, purchase the charged estate, except with the express authority of a *cestui que trust* who

(*b*) *Gowland* v. *De Faria*, 17 Ves. 20; *Life Assoc. of Scotland* v. *Siddal*, 3 De G. F. & J. 58.

(*c*) *Morse* v. *Palmer*, 12 Ves. 353; *Roche* v. *O'Brien*, 1 Ba. & Be. 353.

(*d*) *Murray* v. *Palmer*, 2 S. & L. 486; *Thompson* v. *Ashbee*, 10 Ch. 15.

(*e*) *Crowe* v. *Ballard*, 3 Bro. C. C. 117.

(*f*) *Killick* v. *Flexney*, 4 Bro. C. C. 161; *Williams* v. *Scott*, (1900) A. C. 499; 69 L. J. P. C. 77.

(*g*) *Stacey* v. *Elph*, 1 My. & K. 195; *Parkes* v. *White*, 11 Ves. 209, 226.

is *sui juris* (*h*). But where a mortgagee has in fact purchased from himself under his power of sale, and subsequently sold to a *bonâ fide* purchaser, the purchaser's title is sustained, inasmuch as, though the mortgagee may be accountable to the mortgagor, the purchaser is not bound to see to the application of the purchase-money (*i*).

Purchase of equity of redemption.

A mortgagee, however, does not ordinarily stand in a fiduciary position towards the mortgagor, so as to render a purchase of the equity of redemption by him from the mortgagor (*k*), or from a prior mortgagee selling under a power of sale (*l*), impracticable.

Nevertheless all transactions between a mortgagor and mortgagee are viewed with jealousy, and the sale of an equity of redemption will be set aside where, by the influence of his position, the mortgagee has purchased for less than others would have given, or if there are any circumstances of misconduct in obtaining the purchase (*m*). The same principles apply to the case of the granting of a lease from the mortgagor to the mortgagee (*n*).

Executors and administrators.

(3.) Executors or administrators will not be permitted, either immediately or by means of a trustee, to purchase for themselves any part of the assets, but will be considered as trustees for the persons interested in the estate, and must account to the utmost extent of the advantage made by them of the subject so purchased (*o*). Nor can an executor purchase a legacy from a legatee, even though a co-executor (*p*). So if they compound debts or mortgages,

(*h*) *Downes* v. *Grazebrook*, 3 Mer. 200; *In re Bloye's Trust*, 1 Mac. & G. 488; 3 H. L. 607, 630; *Martinson* v. *Clowes*, 21 Ch. D. 857; aff. W. N. (1885) 41.

(*i*) *Henderson* v. *Astwood*, (1894) A. C. 150; *Bailey* v. *Barnes*, (1894) 1 Ch. 25; 63 L. J. Ch. 73.

(*k*) *Knight* v. *Marjoribanks*, 2 Mac. & G. 10; *Melbourne Banking Co.* v. *Brougham*, 7 App. Cas. 307; 51 L. J. Ch. 65.

(*l*) *Shaw* v. *Bunny*, 33 Beav. 494; 2 De G. J. & S. 468.

(*m*) *Ford* v. *Olden*, 3 Eq. 461; *Prees* v. *Coke*, 6 Ch. 645, 649; *Farrar* v. *Farrar's, Limited*, 40 Ch. D. 395; 58 L. J. Ch. 185.

(*n*) *Ford* v. *Olden*, *sup.*

(*o*) *Hall* v. *Hallett*, 1 Cox, 134; *Wedderburn* v. *W.*, 4 My. & Cr. 41; distinguish *Clarke* v. *C.*, 9 App. Cas. 733; 53 L. J. P. C. 99.

(*p*) *In re Biel's Estate*, 16 Eq. 577;

or buy them in for less than is due upon them, they may not retain any benefit out of the transaction for themselves (*q*). Upon the same principle a receiver cannot purchase (*r*).

Trustee in bankruptcy.

(4.) A trustee of a bankrupt cannot purchase his property (*s*). A purchase by a trustee on being found beneficial has, however, been confirmed by the Court (*t*). He cannot, moreover, purchase the debts of the estate, since to do so would put his duty and his interest in conflict (*u*).

Execution creditor may purchase.

A creditor who has taken out execution is not precluded from becoming a purchaser of the property seized under it (*x*).

Directors and promoters.

(5.) Directors and promoters of companies are within the principle, as being in a fiduciary relation to their shareholders, and special statutory remedies are provided for dealing with such cases. It will be more convenient to consider these in detail in the chapter on Company Law (*y*).

Agents for sale.

(6.) An agent appointed to sell, including an auctioneer, cannot as a rule purchase from his principal unless he make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed (*z*). If there be any suspicious dealing on the part of an agent, such as his purchasing in the name of a third person, the transaction will not be allowed to stand, however fair it may be in other respects (*a*).

So also an agent for sale who takes an interest in a purchase negotiated by himself, is bound to disclose to his

Beningfield v. *Baxter*, 12 App. Cas. 167; 56 L. J. P. C. 13.

(*q*) *Exp. James*, 8 Ves. 337, 346.

(*r*) *Alven* v. *Bond*, 1 My. & K. 196.

(*s*) *Exp. Lacey*, 6 Ves. 623.

(*t*) *Exp. Gore*, 6 Jur. 11, 18; 7 *ib.* 136.

(*u*) *Pooley* v. *Quilter*, 2 De G. & J. 327.

(*x*) *Stratford* v. *Twynam*, Jac. 418. See also *Chambers* v. *Waters*, 3 Sim. 42.

(*y*) *Infra*, p. 661.

(*z*) *Lowther* v. *L.*, 13 Ves. 95; *Oliver* v. *Court*, 8 Price, 127, 160.

(*a*) *Trevelyan* v. *Charter*, 9 Beav. 140; 11 Cl. & F. 714; *Lewis* v. *Hillman*, 3 H. L. 607.

principal the precise nature of his interest, and the burden of proving such full disclosure is on the agent (*b*).

When, however, the contract for sale has been completed and the agency determined, there is nothing then to prevent his repurchase of the property (*c*), provided there be no suspicion of fraud; but as long as the contract remains executory, the agent having power to enforce or rescind it at his pleasure, there can be no such repurchase (*d*).

Agent for purchase.

If an agent employed to purchase, purchases for himself, he will be held a trustee for his principal (*e*), and he will not be permitted, except with the plain and express consent of his principal, to make any profit by becoming a seller to him (*f*).

The case of a stock-jobber employed to purchase, selling his own stock without his principal's knowledge, is within the principle, and the sale will be set aside (*g*).

Partner.

(7.) Upon the same principle a partner employed to purchase for the firm may not make a profit by purchasing for himself and selling to the firm (*h*). There is no rule, however, which prevents a surviving partner from purchasing the share of a deceased partner from his representatives (*i*).

Solicitors.

(8.) The relation of solicitor and client also gives rise to the application of the doctrine. A solicitor employed to sell cannot purchase from his client without full disclosure (*k*); and on the other hand, if employed to purchase, he is accountable to his client for any benefits which he may have clandestinely derived from the sale (*l*). The

(*b*) *Dunne* v. *English*, 18 Eq. 524.

(*c*) *Parker* v. *McKenna*, 10 Ch. 126; *Williams* v. *Scott*, (1900) A. C. 499; 69 L. J. P. C. 77.

(*d*) *Parker* v. *McKenna*, *sup.*

(*e*) *Lees* v. *Nuttall*, 1 R. & My. 53.

(*f*) *Kimber* v. *Barber*, 8 Ch. 56; *Boston Deep Sea, &c. Co.* v. *Ansell*, 39 Ch. D. 339.

(*g*) *Brookman* v. *Rothschild*, 3 Sim. 153; *Gillett* v. *Peppercorne*, 3 Beav. 78. See also *Erskine & Co.* v. *Sachs*, (1901) 2 K. B. 504; 70 L. J. K. B. 978.

(*h*) *Bentley* v. *Craven*, 18 Beav. 75; *Richie* v. *Couper*, 28 Beav. 344. And see now Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 29.

(*i*) *Chambers* v. *Howell*, 11 Beav. 6.

(*k*) *Watt* v. *Grove*, 2 S. & L. 492.

(*l*) *Bank of London* v. *Tyrrell*, 27

remedy, however, may be barred by laches and acquiescence (*m*).

A solicitor or other person, who has the conduct of a sale under a decree, is under an absolute incapacity to purchase thereat; and even though he may not actually have the conduct, if he is so far interested as that it is his duty to assist in procuring the best price for the property offered, he ought not to be allowed to purchase for himself (*n*); but the mere fact of his being concerned in the suit is not sufficient to incapacitate him (*n*), particularly if he has leave to bid at the sale (*o*), and an assignment effected before his retainer as solicitor has been sustained, notwithstanding that he subsequently acted in the suit (*p*).

Not incapable of contracting with client,

A solicitor is not incapable of contracting with his client; but if such a contract is challenged a solicitor can only support it by clear proof of its fairness and of the absence of any concealment (*q*); and it is always preferable for a solicitor contemplating a purchase from his client to insist on the intervention of another legal adviser (*q*).

but should generally not do so.

Even after ceasing to act as adviser.

And although he may have ceased to act as the client's adviser, he may not use to his advantage the knowledge of the client's affairs acquired during the continuance of the relation, and which is concealed from the client (*r*).

Counsel.

The same rules apply to counsel as to solicitors (*s*), and it matters not that the adviser acted gratuitously (*t*).

Solicitors Act, 1870.

Formerly an agreement by a solicitor to receive a fixed sum for costs for business thereafter to be done was not binding on the client, who might in spite of it require a

Beav. 273; 10 H. L. 26; *Harpham* v. *Shacklock*, 19 Ch. D. 207.

(*m*) *Nutt* v. *Easton*, (1900) 1 Ch. 29; 69 L. J. Ch. 46.

(*n*) *Sidny* v. *Ranger*, 12 Sim. 118.

(*n*) *Guest* v. *Smythe*, 5 Ch. 551.

(*o*) *Boswell* v. *Coaks*, 23 Ch. D. 302; 27 *ib.* 424; *Coaks* v. *Boswell*, 11 App. Cas. 232; 55 L. J. Ch. 761.

(*p*) *Davis* v. *Freethy*, 24 Q. B. D. 519; 59 L. J. Q. B. 318; *Simpson* v. *Lamb*, 7 E. & B. 84. See *infra*, p. 371.

(*q*) *Pisani* v. *Att.-Gen. for Gibraltar*, 5 P. C. 516; *McPherson* v. *Watt*, 3 App. Cas. 254.

(*r*) *Cane* v. *Allen*, 2 Dow, 289; *Edwards* v. *Meyrick*, 2 Hare, 69.

(*s*) *Carter* v. *Palmer*, 8 Cl. & F. 657.

(*t*) *Hobday* v. *Peters*, 28 Beav. 149.

bill of costs and taxation (*u*). Express provision is, however, now made for such contracts, as to contentious business by 33 & 34 Vict. c. 28 (*x*), and as to non-contentious business by 44 & 45 Vict. c. 44 (*y*); but contracts made under these Acts are still liable to review by a taxing master, if shown to be unfair or unreasonable, and they must be in writing (*z*).

Arbitrator.

(9.) An arbitrator is unable to purchase the unascertained claims of any of the parties to the reference (*a*). He has, in fact, a similar position to a judge, who cannot, except by consent of the parties, deliver a valid judgment in the subject-matter of which he has an interest.

Guardian and ward.

(10.) Transactions between a guardian and ward during the existence of the relationship are considered invalid (*b*), and even after the ward has become of age the Court regards such dealings with suspicion (*c*). If, however, full consideration has been paid, they could not be set aside (*d*). Where a guardian bought up incumbrances on the ward's estate at an undervalue he was held trustee for the ward, and was only allowed to charge him what he actually paid (*e*).

Any relation of confidence.

(11.) Where no definite relationship such as those we have considered exists between the parties, yet nevertheless, if there exists a confidence between them of such a character as enables the person in whom such confidence is reposed to exert exceptional influence over the person trusting him, the Court will not allow any transaction between them to stand unless there has been full explanation and communication of every particular in the knowledge of the person who seeks to establish the contract (*f*).

Tate v. *Williamson.*

(*u*) *Re Newman*, 30 Beav. 396.
(*x*) Ss. 4, 7—10.
(*y*) S. 8.
(*z*) *Re Russell*, 30 Ch. D. 114; *Re Palmer*, 45 Ch. D. 291; 59 L. J. Ch. 575; *Re Frape*, (1893) 2 Ch. 284; 62 L. J. Ch. 473; *Re Baylis*, (1896) 2 Ch. 107; 65 L. J. Ch. 612.
(*a*) *Blennerhasset* v. *Day*, 2 Ba. & Be. 16.
(*b*) *Powell* v. *Glover*, 3 P. Wms. 251, n.
(*c*) *Grosvenor* v. *Sherratt*, 28 Beav. 659.
(*d*) *Hylton* v. *H.*, 2 Ves. Sr. 549.
(*e*) *Henley* v. ——, 2 Ch. Ca. 245.
(*f*) *Tate* v. *Williamson*, 2 Ch. 55.

In the case referred to there was great disparity of age between the parties, and the younger was known to be in pecuniary distress. In the absence of any such relationship and of fraud, mere inadequacy of consideration will not be a sufficient reason for setting aside a sale (*g*), but gross inadequacy of price coupled with want of due protection and advice, precipitation in carrying out the bargain, especially when the vendor is poor and illiterate, has often been considered sufficient evidence of fraud to enable the vendor to set aside a contract (*h*). There is no such fiduciary relation between tenants in common as will throw suspicion on transactions between them (*i*). See Fraud, *infra*, p. 174 *et seq.*

Nature of relief.

3. The nature of the relief afforded by equity.

A *cestui que trust* (under which term are now included all persons who on the above grounds are entitled to set aside a sale) has usually a choice of two courses.

Option.

Reconveyance with compensation.

(1.) He may insist on a reconveyance of the property from the trustee who purchased it (if it remains in his hands unsold), or from a person who has purchased it from him with notice of the breach of trust (*k*). Such reconveyance will be decreed on the terms of his repaying the purchase-money with interest at four per cent., and all sums which may have been expended in repairs and improvements of a permanent nature. On the other hand, there will be an allowance made for all acts tending to deteriorate the value of the estate; and the trustee must account for all rents and profits received by him, and pay an occupation rent for such part of the estate as he has retained in his actual possession (*l*). In some cases,

(*g*) *Harrison* v. *Guest*, 6 De G. M. & G. 424; 8 H. L. 481.

(*h*) *Longmate* v. *Ledger*, 2 Giff. 157; *Baker* v. *Monk*, 33 Beav. 419.

(*i*) *Kennedy* v. *De Trafford*, (1896) 1 Ch. 762; (1897) A. C. 180; 66 L. J. Ch. 413.

(*k*) *York Buildings Co.* v. *Mackenzie*, 8 Bro. P. C. 42; *Pearson* v. *Benson*, 28 Beav. 598.

(*l*) *Hall* v. *Hallett*, 1 Cox, 134; *Campbell* v. *Walker*, 5 Ves. 678, 682; *Mill* v. *Hill*, 3 H. L. 828, 869.

however, where sales have been set aside for actual fraud, allowance for money laid out in improvements has been refused (*m*).

(2.) But if the *cestui que trust* does not wish for a re-conveyance, an order will be made that the expense of repairs and improvements, after making allowance for deteriorating acts, shall be added to the purchase-money, and that the estate shall be put up at the accumulated sum. If any one makes an advance upon that sum the trustee shall not have the estate; if not, he will be held to his purchase (*n*). Resale.

(3.) Where the trustee has resold the estate to a purchaser without notice, the *cestui que trust* can, as in the principal case, make him account for his receipts with interest. Account of profits.

(4.) The costs of the suit where the sale has been set aside must be paid by the trustee (*o*), unless there has been great delay on the part of the *cestui que trust* (*p*); and where a suit has failed on account of such delay the trustee has been refused his costs (*q*). Costs.

(*m*) *Kenney* v. *Browne*, 3 Ridg. 518.

(*n*) *Exp. Reynolds*, 5 Ves. 707; *Tennant* v. *Trenchard*, 4 Ch. 537, 546.

(*o*) *Sanderson* v. *Walker*, 13 Ves. 601.

(*p*) *Att.-Gen.* v. *Dudley*, Coop. 146.

(*q*) *Gregory* v. *G.*, Coop. 201.

Section V.—Duties and Liabilities of Trustees.

I. *Getting in Trust Property, Perishable Property and Reversions.*
II. *Custody of Trust Property.*
III. *Investment.*
IV. *Liability of Co-trustees.*
V. *Remedies of a* Cestui que Trust.
VI. *Remuneration of Trustees.*

In considering the position of trustees generally, we will first discuss their duties with respect to the trust property. And this naturally divides itself under three heads: 1st. As to the getting in of outstanding property of the trust. 2ndly. As to the custody of such property. 3rdly. As to its proper investment.

I. *Getting in outstanding Trust Property.*

Getting in outstanding property.

It is among the most important of the duties of a trustee to take such steps as are necessary for the security of the trust property; and the first of such steps is to get all such property into his hands, or under his control. In other words, all outstanding property must be reduced into possession.

Debts collected.

1.—(1.) Debts due to the trust must therefore, with all reasonable diligence, be collected. Money may not be left outstanding upon personal security; and this although

the security of the loan giving rise to the debt be one which the creator of the trust considered sufficient (*a*). The only excuse for not taking action to enforce payment is a well-founded belief that such action would be fruitless; and the burden of proving the grounds of such belief is on the trustees (*b*).

Trustee is allowed a discretion.

Trustees are allowed the exercise of a fair discretion, and are not expected to commence legal proceedings unnecessarily, nor where such proceedings would be useless (*c*), but they will not be justified in granting any great indulgence (*d*). In case a loss to the estate is occasioned by neglect of this duty, a trustee or executor will be personally answerable. If there be more than one executor, each one is entitled to exercise his discretion without risk, notwithstanding the opposition or difference of opinion of another (*e*).

Releasing and compounding debts.

23 & 24 Vict. c. 145, s. 30.

(2.) In the exercise of a sound discretion trustees might, even before 23 & 24 Vict. c. 145, release or compound a debt (*f*), and by that statute this power was confirmed and extended. Now by the Trustee Act, 1893 (*g*), s. 21, executors, administrators and trustees are authorised to accept any composition, or any security real or personal, for any debt, or for any property real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes to enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases and other things as seem expedient, without being responsible for any loss occasioned by anything so done in good faith (*h*).

(*a*) *Powell* v. *Evans*, 5 Ves. 839; *Bullock* v. *Wheatley*, 1 Coll. 130.
(*b*) *Billing* v. *Brogden*, 38 Ch. D. 546.
(*c*) *Clark* v. *Holland*, 19 Beav. 271.
(*d*) *Lowson* v. *Copeland*, 2 Bro. C. C. 156; *Caffrey* v. *Darby*, 6 Ves. 488.
(*e*) *Buxton* v. *B.*, 1 My. & Cr. 80; *Marsden* v. *Kent*, 5 Ch. D. 598.
(*f*) *Blue* v. *Marshall*, 3 P. Wms. 381; *Ratcliffe* v. *Winch*, 17 Beav. 216.
(*g*) 56 & 57 Vict. c. 53.
(*h*) *Sheffield, &c. Building Society*

Money employed in trade.

2. Money employed by a testator in trade may not be suffered to remain so invested by his executors, without express authority (*h*); and where such authority is given it must be exercised with discretion and in strict accordance with its terms (*i*). Reasonable time is of course allowed for the purpose of winding up the concern; and the Court has jurisdiction in an administration suit to direct that a trade or business in which infants are interested shall be continued, and will so direct if it be for their benefit (*k*).

Perishable property with life interests and reversionary property.

3. Very frequently we find in a will personal property of a perishable nature bequeathed to a person for life with remainder over. In such a case the question arises whether the intention was that the first legatee should enjoy the property specifically, with the possible consequence that by the consumption or falling in of the property the remainderman will receive no benefit at all; or whether, for the equal treatment of both, the property should be sold, and the proceeds laid out on permanent investments. Conversely, reversionary property is sometimes similarly bequeathed, and the question is whether it is to remain in its existing state, with the possible consequence of its not falling into possession during the lifetime of the first tenant, so that though named as a beneficiary he will receive nothing from it, or whether again for the equal treatment of both it should be sold and invested so as to produce an immediate income.

General rule requires conversion.

On these questions the case of *Howe* v. *Lord Dartmouth* (*l*) is a leading authority. From it we gather that *whenever there is a general bequest of property of a wasting nature, such as long annuities or leaseholds, to persons in succession, the general rule is that it should be forthwith con-*

v. *Aizlewood*, 44 Ch. D. 412; 59 L. J. Ch. 34; *Sneath* v. *Valley Gold, Lim.*, (1893) 1 Ch. 477.

(*h*) *Kirkman* v. *Booth*, 11 Beav. 273.

(*i*) *Arnold* v. *Smith*, (1896) 1 Ch. 171; 65 L. J. Ch. 269; *Midgley* v. *Crowther*, (1895) 2 Ch. 56; 64 L. J. Ch. 537.

(*k*) *Perry* v. *P.*, 3 Ir. Eq. 452.

(*l*) 7 Ves. 137; 2 W. & T. L. C. 296.

verted, and laid out in permanent securities; and again, that reversionary property, or property the enjoyment of which is not to commence until a future time, or until the happening of a contingency, ought to be similarly converted.

The principle is thus expressed in *Hinves* v. *H.* (*m*): "The result of the rule laid down by Lord Eldon in *Howe* "v. *Lord Dartmouth* (*n*), and by Lord Cottenham in "*Pickering* v. *P.* (*o*), is that where personal estate is given "in terms amounting to a general residuary bequest to be "enjoyed by persons in succession, the interpretation "which the Court puts upon the bequest is that the per- "sons indicated are to enjoy the same thing in succession; "and in order to effectuate that intention, the Court as a "general rule converts into permanent investments as "much of the personalty as is of a wasting or perishable "nature at the death of the testator, and also reversionary "interests."

Subject to testator's intention if ascertainable.

This general principle is simple enough: but like all general principles it is subject to the paramount rule that in the construction of wills the testator's intention is, if ascertainable, to prevail. He may of course direct, if he chooses, that his property, however wasting, shall be specifically enjoyed in the first place by a life tenant, and that the remainderman shall take only what chance may leave for him; and difficulties often arise in ascertaining whether such is, or is not, the testator's intention.

What amounts to indication of contrary intention.

This question is one which evidently depends upon the language of each particular instrument, so that no general formula can be laid down for its decision. We can only illustrate from actual cases what has and what has not been considered sufficient to entitle the legatee to enjoyment of perishable property *in specie, observing, however, that in all cases the burden of proof is upon the person who opposes immediate conversion according to the rule* (*p*).

(*m*) 3 Ha. 609, 611.
(*n*) *Supra*.
(*o*) 4 My. & Cr. 289.
(*p*) *Macdonald* v. *Irvine*, 8 Ch. D. 101.

Absence of direction to convert does not.

The mere absence of a direction to convert the property has never been considered to mean that it should be enjoyed *in specie* (*q*). On the other hand, if there is a *specific gift* of such property, then the mere fact that trustees have a discretionary power to sell it is not a reason for converting it. The discretion is deemed to be given only for the security of the property, not with a view to vary or affect the relative rights of the legatees (*r*). And where there was a direction in a will that trustees should in their sole discretion sell so much and such parts of the residuary estate as they might think necessary, the Court declined to interfere with their discretion so as to prevent a tenant for life enjoying leaseholds *in specie* (*s*). An express direction for sale at a given period indicates an intention that there should be no previous sale or conversion (*t*). And where, after giving power to postpone conversion of his property, the testator declared that until sale the net rents, profits and income should be paid to the persons to whom the income would be payable if the sale had not actually been made, the profits of a business were held to be payable to the tenant for life until sale (*u*).

Court will not interfere with discretion if given.

Use of words "rents" and "dividends."

General rule.

There has been much discussion as to whether the use of such particular words as "rents" and "dividends," in describing the proceeds of property bequeathed, amounts to a sufficient indication of intention against conversion. The result of the cases seems to be that where there is in a residuary gift a trust to pay "rents" to persons in succession, and the residue *comprises no other property except leaseholds* to which it is applicable, then the leaseholds are to be enjoyed *in specie* (*x*). But if the residue *comprised*

(*q*) *Johnson* v. *J.*, 2 Coll. 441; *Morgan* v. *M.*, 14 Beav. 72, 83; *Hart* v. *Stone*, (1896) 1 Ch. 754; 65 L. J. Ch. 271.

(*r*) *Lord* v. *Godfrey*, 4 Madd. 455; *Nixon* v. *Sheldon*, 39 Ch. D. 50; 58 L. J. Ch. 25; *Brandreth* v. *Colvin*, (1896) 2 Ch. 199; 65 L. J. Ch. 120.

(*s*) *Re Sewell's Estate*, 11 Eq. 80; *Gray* v. *Siggers*, 15 Ch. D. 74.

(*t*) *Alcock* v. *Sloper*, 2 My. & K. 699.

(*u*) *Chancellor* v. *Brown*, 26 Ch. D. 42; 53 L. J. Ch. 443; *Wood* v. *Thomas*, (1891) 3 Ch. 482; 60 L. J. Ch. 781.

(*x*) *Goodenough* v. *Tremamondo*, 2 Beav. 512; *Vachell* v. *Roberts*, 32

freeholds as well as leaseholds, the word "rents" would be sufficiently accounted for without supposing it to apply to the leaseholds, and its presence would not sufficiently indicate an intention to avoid the usual rule as to their conversion (*y*).

The word "dividends" has been considered sufficient to entitle a legatee for life to the enjoyment of long annuities *in specie* (*z*). But it would not suffice to qualify an express direction to convert preceding it (*a*).

Power of attorney directed to *cestui que trust*.

A direction that power of attorney should be given to *cestui que trusts* entitled to receive in succession the income of property, may show an intention that they should enjoy it *in specie* (*b*).

Direction to divide after death of tenant for life.

A direction to divide property after the death of the tenant for life has been held to indicate a similar intention (*c*). So an exception from a general direction to convert may show an intention that long annuities are to be enjoyed *in specie* (*d*).

Effect of leaseholds enjoyable *in specie* purchased under compulsory powers.

Where a tenant for life is entitled to the enjoyment of leaseholds *in specie*, and they are taken by a company under compulsory powers, and the purchase-money paid into Court, he is entitled to the same benefit thereout as he would have had from the lease (*e*); the mere interest of the money would not be an adequate compensation (*f*). And where the tenant for life in such case outlives the term for which he was entitled as tenant for life, he will become absolutely entitled to the whole fund (*g*).

Rule where conversion would result in loss.

Where property, the subject-matter of a bequest given to persons in succession, is found by the trustees of a

(*y*) *Pickup* v. *Atkinson*, 4 Ha. 624; *Craig* v. *Wheeler*, 29 L. J. Ch. 374; *Game* v. *Young*, (1897) 1 Ch. 881; 66 L. J. Ch. 505.

(*z*) *Alcock* v. *Sloper*, *sup.*

(*a*) *Bate* v. *Hooper*, 5 De G. M. & G. 338.

(*b*) *Neville* v. *Fortescue*, 16 Sim. 333.

(*c*) *Collins* v. *C.*, 2 My. & K. 703.

(*d*) *Wilday* v. *Sandys*, 7 Eq. 455.

(*e*) 8 & 9 Viet. c. 18, s. 74.

(*f*) *Jeffreys* v. *Connor*, 28 Beav. 328.

(*g*) *In re Beaufoy's Estate*, 1 Sm & G. 20.

testator to be so laid out as to be secure, and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate, there the rule is not to convert the property, but to set a value upon it, and to give the tenant interest on such value; the residue of the income must then be invested, and the income of the investment paid to the tenant for life, the *corpus* being secured to the remainderman. Formerly interest was calculated at four per cent. (*h*). When, according to the construction of a will, the executors have full power to retain certain securities as long as they think advantageous, or to invest the money of the estate upon similar securities, while any such securities remain a part of the testator's estate, the tenant for life is entitled to the specific income arising therefrom; and when trustees do not convert unauthorised securities, the tenant for life was held to be entitled to an income from the testator's death equal to the dividends of the consols which would have been produced by a sale and investment in consols at a year from the testator's death, and not, as in *Robinson* v. *R.* (*i*), to interest at four per cent. on their value. In more recent cases interest at three per cent. only has been allowed, as being more agreeable to the facts of present experience (*k*), and the rule extends to reversionary property which is not producing interest as well as to a wasting security (*l*).

Power of trustees when made liable to recover back from tenant for life.

Where trustees were made liable to a remainderman for having improperly allowed perishable property to remain *in specie*, and to be enjoyed by the tenant for life, they were allowed by means of an inquiry in the same suit to recover back against the estate of the tenant for life the amount overpaid to him (*m*). And where trustees,

(*h*) *Brown* v. *Gellatly*, 2 Ch. 751; and see also *Re Chesterfield's Trusts*, 24 Ch. D. 643; 52 L. J. Ch. 958; *Frowde* v. *Hengler*, (1893) 1 Ch. 586; 62 L. J. Ch. 383; *Teague* v. *Fox*, (1893) 1 Ch. 292; 62 L. J. Ch. 469.

(*i*) 1 De G. M. & G. 247.

(*k*) *Marland* v. *Williams*, (1895) 2 Ch. 537; 65 L. J. Ch. 71; *Hay* v. *Woolmer*, (1895) 2 Ch. 542; 65 L. J. Ch. 29.

(*l*) *Rowlls* v. *Bebb*, (1900) 2 Ch. 107; 69 L. J. Ch. 562.

(*m*) *Hood* v. *Clapham*, 19 Beav. 90.

having a discretion as to the time of conversion, allow reversionary property to remain unsold until it falls into possession, the tenant for life will be entitled to have paid to him in respect of interest out of the property, the amount which he would have received had the trustees sold the property at the end of one year after the testator's death (*n*).

It must be observed that the principle of *Howe* v. *Lord Dartmouth* is only applicable in the case of residuary bequests in wills. It has no application to settlements (*o*).

Money invested on good security to remain so.

4. Money invested on good real securities is not required to be called in, unless, of course, it is necessary for the payment of debts (*p*); and in an administration action the Court would not permit a real security to be called in without inquiry as to its expediency (*q*). It has been held that a trustee is not bound to call in a fund invested upon a second mortgage (*r*); but seeing that such a security, however apparently ample, is continually liable to damage from the operation of the doctrines of tacking and consolidation (as to which see *infra*, pp. 296, 305), such investments are manifestly undesirable. If, moreover, a trustee has reason to suppose that any real security is not good, it is his duty to call it in at once (*s*). To render trustees liable in such a case, wilful default, including want of ordinary prudence, must be shown (*t*).

Second mortgage.

Property in power of third parties.

5. It is the duty of trustees also to place the trust property beyond the power of any third parties. Thus if the trust fund is an equitable interest of which the legal estate cannot be at present transferred, the trustees must

(*n*) *Wilkinson* v. *Duncan*, 23 Beav. 469; *Wright* v. *Lambert*, 6 Ch. D. 649.

(*o*) *Boustead* v. *Cooper*, (1901) 2 Ch. 779; 70 L. J. Ch. 825; *Hope* v. *H.*, 1 Jur. N. S. 770.

(*p*) *Orr* v. *Newton*, 2 Cox, 276.

(*q*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, 150.

(*r*) *Robinson* v. *R.*, 1 De G. M. & G. 252.

(*s*) *Ames* v. *Parkinson*, 7 Beav. 384.

(*t*) *Cocks* v. *Chapman*, (1896) 2 Ch. 763; 65 L. J. Ch. 892.

at once give notice of their interest to the person in whom the legal estate is vested, in order to avoid a subsequent purchaser gaining priority by giving the first notice (*u*). Similarly a trustee of a settlement which requires registration is responsible for any loss arising from a neglect to procure registration (*x*).

Consequences of neglect to realise generally.

6. Where executors have neglected to realise outstanding assets, the *primâ facie* rule is that they are liable for any loss which arises after the expiration of a year from the testator's death, and executors who have not completed the conversion by that time must be prepared to justify their delay (*y*). The rule, however, is not an absolute one, and if in the circumstances of any case a longer delay seemed reasonable, no liability is incurred thereby (*z*).

Under order of Court.

When trustees are ordered by the Court to realise securities, and they neglect to do so, they will be liable for any loss sustained by their neglect; such direction overrides their discretion (*a*).

Where they have special discretionary power.

On the other hand, if by the instrument creating the trust trustees are given a special discretion as to whether funds shall be called in or not, this will override the usual operation of the rule; and then, in order to charge them with loss, it will be necessary to establish a clear case of misconduct against them (*b*).

Judicial Trustees Act.

As to the relief afforded to trustees in investment cases under the Judicial Trustees Act, 1896 (*c*). (See *infra*, p. 127.)

(*u*) *Jacob* v. *Lucas*, 1 Beav. 436.
(*x*) *Macnamara* v. *Carey*, 1 I. R. Eq. 9. See also *Kingdon* v. *Castleman*, W. N. (1877) p. 15.
(*y*) *Grayburn* v. *Clarkson*, 3 Ch. 606; *Sculthorpe* v. *Tipper*, 13 Eq. 232.
(*z*) *Hughes* v. *Empson*, 22 Beav. 181.
(*a*) *Davenport* v. *Stafford*, 14 Beav. 319, 338.
(*b*) *Paddon* v. *Richardson*, 7 De G. M. & G. 563, 582.
(*c*) 59 & 60 Vict. c. 35.

II. *As to the Custody of Trust Property.*

A leading authority on the duties and liabilities of trustees as to the custody of trust property is the case of *Speight* v. *Gaunt* (*d*), in which the House of Lords held that *though a trustee may not "delegate at his own will and "pleasure, the execution of his trust, and the care and custody "of the trust moneys, to strangers," yet "that when, according "to the regular and usual course of business, moneys receivable "or payable ought to pass through the hands of mercantile "agents, that course may properly be followed by trustees, "though the moneys are trust moneys."* (*Per* the Earl of Selborne, pp. 4, 5.)

In the same case Lord Blackburn said that "as a "general rule a trustee sufficiently discharges his duty if "he takes, in managing trust affairs, all those precautions "which an ordinary prudent man of business would take "in managing similar affairs of his own," with the exception that he "must not choose investments other than "those which the terms of his trust permit."

In the application of the principle thus laid down, the following points may be observed. General principle.

1. If a loss occurs by unavoidable accident, if, for instance, without any fault of the trustees, the trust funds are stolen from them or from anyone entrusted therewith, they are not liable (*e*). Not liable for accident,

2. Similarly, if in a proper course of business they deposit money in a bank, and the bank fails, they are not liable (*f*). By Lord St. Leonards' Act (*g*), s. 31, it was enacted that every instrument creating a trust should be deemed to contain a clause exonerating the trustees from or ordinary conduct of business.

(*d*) 9 App. Cas. 1; 53 L. J. Ch. 419.

(*e*) *Jones* v. *Lewis*, 2 Ves. sr. 240; *Job* v. *J.*, 6 Ch. D. 562.

(*f*) *Exp. Belchier*, Amb. 218; *Johnson* v. *Newton*, 11 Ha. 160; *Fenwicke* v. *Clarke*, 31 L. J. N. S. Ch. 728.

(*g*) 22 & 23 Vict. c. 35.

Trustee Act, 1893.

liability for any banker, broker, or other person with whom any trust moneys or securities might be deposited. And by the Trustee Act, 1893 (*h*), which repeals this section, the protection of the trustee is somewhat extended by the provision that he is answerable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default. But neither the statutes nor the decisions diminish the importance of the inquiry, whether there was good reason for allowing the money to remain in another's hands. The cases show that it is considered a sufficient reason if it is necessary for the ordinary purposes of the trust that a certain sum should be kept in hand, as for the payment of debts, or current expenses or legacies; or if the money is so deposited pending negotiations for its more secure investment. Such moneys must remain somewhere, and in the usual course of business one would utilise a bank for the purpose. It is also similarly reasonable to allow a deposit on a sale to remain in the hands of an auctioneer (*i*). The effect of the statutes is to throw the burden of proof on those who seek to charge the trustee (*k*).

Liable for risks unnecessarily incurred.

If, however, moneys be left unnecessarily in the hands of third parties, as in the hands of a banker or solicitor, more than a year after a testator's death, and after the debts and legacies are paid, and a loss occurs, the trustees or executors are liable (*l*). Title deeds may be left in the hands of a solicitor, where, from the nature of the trust, frequent reference to them is necessary (*m*), and convertible securities, such as bonds payable to bearer, though authorised by the trust, though not properly deposited

(*h*) 56 & 57 Vict. c. 53, s. 24.
(*i*) *Edmonds* v. *Peake*, 7 Beav. 239.
(*k*) *Re Brier*, 26 Ch. D. 238.
(*l*) *Darke* v. *Martyn*, 1 Beav. 525; *Castle* v. *Warland*, 32 Beav. 660.
(*m*) *Field* v. *F.*, (1894) 1 Ch. 425; 63 L. J. Ch. 233.

with a solicitor, may be deposited in the joint names of trustees with a banker (*n*).

The Trustee Act, 1893 (*o*), further protects trustees by enabling a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable under the trust, by permitting the solicitor to have the custody of and to produce a deed containing a receipt clause embodied or indorsed, and by enabling him to appoint a banker or solicitor to be his agent to receive policy moneys, and for that purpose to have the custody of and produce the policy of assurance. But it appears that an attorney of a trustee under a *general* power cannot authorise a receipt under this section, though with *express* power he might do so (*p*). An agent may in proper circumstances be employed to invest, but money should not be deposited with him until the investment is found: to do so would be to lend on personal security. Moreover, agents, such as brokers, solicitors, or valuers, must not be employed out of the ordinary scope of their business (*q*); and the last quoted statute enacts that nothing therein shall exempt a trustee from any liability which he would have incurred if the Act had not been passed, in case he permits any money or property to remain in the hands or under the control of the banker or solicitor longer than is reasonably necessary to enable him to pay or transfer the same to the trustee.

Trustee Act, 1893.

3. A trustee who, without entirely parting with control over the trust fund, associates another person with him in its management, and so loses the exclusive power over it, will be liable for any loss which results from such a step (*r*). An illustration of this occurs where a sole trustee invests a fund in the joint names of himself and another, and

Associating with others in control of fund,

(*n*) *Dent* v. *De Pothonier*, (1900) 2 Ch. 529; 69 L. J. Ch. 773.
(*o*) 56 & 57 Vict. c. 53, s. 17.
(*p*) *Re Hetling and Merton*, (1893) 3 Ch. 269, 280; 62 L. J. Ch. 783.
(*q*) *Fry* v. *Tapson*, 28 Ch. D. 268; *Andrews* v. *Weall*, 42 Ch. D. 674; 58 L. J. Ch. 713
(*r*) *Salway* v. *S.*, 2 R. & My. 215.

so deprives himself of an unfettered discretion as to its removal (*s*).

or leaving it in entire control of co-trustee.

4. *A fortiori*, a trust fund should not be left under the entire control of a co-trustee. Thus trust money should, where there is more than one trustee, be invested or deposited in the joint names of all, and payable only to their joint order or cheque (*t*).

III. *As to Investment.*

Not to invest on personal security.

1. As we have seen that an executor or trustee may not suffer the trust fund to remain outstanding on personal security, though the credit may have been given by the creator of the trust, so it is clear that he is not justified in lending trust money on personal security, even to a person to whom the creator of the trust had been accustomed so to lend money (*u*). Neither a joint personal security (*x*) nor a loan on a bond with sureties (*y*) is a proper investment. If he retains money unnecessarily in his own hands uninvested, he may be charged with compound interest thereon at 3 per cent. (*z*).

Save with express authority.

In order to warrant investment on personal security *the express authority of the creator of the trust is necessary* (*a*); mere general expressions giving to trustees a discretion are not sufficient (*b*).

Not even then to one of themselves.

Even if trustees are authorised to lend upon personal security they may not lend to one of themselves (*c*), or to

(*s*) *White* v. *Baugh*, 3 Cl. & F. 44.
(*t*) *Clough* v. *Bond*, 3 My. & Cr. 490; *Trutch* v. *Lamprell*, 20 Beav. 116.
(*u*) *Terry* v. *T.*, Prec. Ch. 273; *Darke* v. *Martyn*, 1 Beav. 525.
(*x*) *Holmes* v. *Dring*, 2 Cox, 1.
(*y*) *Watts* v. *Girdlestone*, 6 Beav. 188.
(*z*) *Barclay* v. *Andrew*, (1899) 1 Ch. 674; 68 L. J. Ch. 383.
(*a*) *Forbes* v. *Ross*, 2 Bro. C. C. 430; *Child* v. *C.*, 20 Beav. 50.
(*b*) *Pocock* v. *Reddington*, 5 Ves. 794; *Mills* v. *Osborne*, 7 Sim. 30.
(*c*) *Francis* v. *F.*, 5 De G. M. & G. 108.

a relation for the purpose of accommodating him (*d*). And any terms specified in the authority so to lend must be strictly complied with; for instance, if the consent of any person is required, or the security of a bond is directed (*e*). And where there was authority to lend to a firm, it was held that a change in the membership of the firm determined the authority (*f*). The term "personal security" has a wider meaning than the security of personal property. It has been held to include a loan upon mere personal credit (*g*). But an investment clause expressed in the widest terms must be interpreted prudently and honestly. An investment effected with a view to the trustee's own benefit is a breach of trust, though it may be within the terms of the clause (*h*).

Authority to be strictly complied with.

2. Permission is often expressly given to invest in real securities, and is moreover provided for by statute (*i*). But questions often arise as to what is included in the expression. It clearly does not authorise the *purchase* of land. Investment means loan on security; and special powers are required for the conversion of personal into real estate. The most ordinary investments on real securities are mortgages of freeholds. Copyholds are within the expression (*k*). Leaseholds are not so in strictness (*l*); but a long term of years, free from onerous covenants and at a peppercorn rent, was stated to be justifiable, even before 44 & 45 Vict. c. 41, s. 65, gave power to enlarge such a term into a fee simple (*m*); and now by sect. 5 of the Trustee Act, 1893 (*n*), a power to invest in real securities, unless

"Real securities." What?

(*d*) *Langston* v. *Ollivant*, G. Coop. 33.

(*e*) *Cocker* v. *Quayle*, 1 Russ. & My. 535.

(*f*) *Tucker* v. *T.*, (1894) 1 Ch. 724; 63 L. J. Ch. 223; *Smith* v. *Patrick*, (1901) A. C. 282; 70 L. J. P. C. 19.

(*g*) *Pickard* v. *Anderson*, 13 Eq. 608.

(*h*) *Smith* v. *Thompson*, (1896) 1 Ch. 71; *Knox* v. *Mackinnon*, 13 App. Cas. 754.

(*i*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1.

(*k*) *Wyatt* v. *Sharratt*, 3 Beav. 498.

(*l*) *Re Boyd's Settled Estate*, 14 Ch. D. 626.

(*m*) *Jones* v. *Chennell*, 8 Ch. D. 493.

(*n*) 56 & 57 Vict. c. 53.

expressly limited by the instrument creating the trust, authorises a mortgage on a term of not less than 200 years unexpired, which is not subject to a rent greater than a shilling a year or to any condition for re-entry, except for non-payment of rent.

Short leaseholds are, of course, not admissible (*o*), nor is an estate for life (*p*). More difficulty arises in the case of such securities as corporation debentures charged on rates, or on the property of a company including land, or bonds secured on harbour duties or tolls. In many cases a disposition has been shown not to regard such investments as interests in land within the Mortmain Acts, the tendency having been to favour charities in this respect (*q*). But where the question is merely one of the validity of investment, such securities would probably now be deemed valid real securities (*r*). The above quoted section of the Trustee Act, 1893, authorises, in default of contrary directions, charges or mortgages of charges under the Improvement of Land Act, 1864 (*s*), as real investments.

Loan on mortgage should only be to value of two-thirds.

A trustee or executor lending money on mortgage is not chargeable with breach of trust if the amount of the loan does not exceed two-thirds of the value of the property as valued by a practical and independent surveyor or valuer, or one whom he reasonably believes to be such, and the security is in other respects a proper one (*t*). If the loan exceeds this limit but would be good for a smaller sum, the trustee is only liable in respect of the excess (*u*). Where a security originally sufficient subsequently fell below the proper value, trustees were held to be not bound

(*o*) *Fuller* v. *Knight*, 6 Beav. 209.

(*p*) *Lander* v. *Weston*, 3 Drew. 389.

(*q*) *Martin* v. *Lacon*, 33 Ch. D. 332; 55 L. J. Ch. 878; *Elmsley* v. *Mitchel*, (1894) 2 Ch. 88; 3 *ib.* 704; 64 L. J. Ch. 92.

(*r*) *Driver* v. *Broad*, (1893) 1 Q. B. 539, 744; 63 L. J. Q. B. 12; *Birrell* v. *Greenhough*, (1897) 1 Ch. 928; 66 L. J. Ch. 558; *Buckley* v. *Royal Lifeboat Assoc.*, 43 Ch. D. 27; 59 L. J. Ch. 87.

(*s*) 27 & 28 Vict. c. 114.

(*t*) 56 & 57 Vict. c. 53, s. 8; replacing 51 & 52 Vict. c. 59, s. 4; *Re Walker*, 59 L. J. Ch. 386; *Somerset* v. *Poulett*, (1894) 1 Ch. 231; 63 L. J. Ch. 41; *Rae* v. *Meek*, 14 App. Cas. 558; 59 & 60 Vict. c. 35.

(*u*) *Ibid.*; *Priest* v. *Uppleby*, 42 Ch. D. 351.

at once to call in the mortgage. It is their duty in such a case to exercise the discretion of practical men (*x*).

For the reasons elsewhere given (*y*) money should not be lent on a second mortgage, unless, at least, the legal estate can be promptly secured (*z*). Nor should money be lent on mortgage to a co-trustee (*a*). A contributory mortgage (that is, a mortgage in which the trustee associates himself with another as mortgagee) is not admissible, inasmuch as the security is not in his sole control (*b*). Second and contributory mortgages, bad.

It is a fallacy to suppose that a trustee is relieved from the careful exercise of a sound discretion by the fact that the investment clause in the instrument creating the trust may in terms authorise certain indifferent securities, or that where such is the case an improvident investment will be excused on the ground that the trustee has risked funds of his own on similar investments. "The duty of a trustee "is not to take such care only as a prudent man would "take if he only had himself to consider. The duty rather "is to take such care as an ordinary prudent man would "take if he were minded to make an investment for the "benefit of other people for whom he felt morally bound "to provide" (*c*). The same authorities show that it is dangerous for a trustee to rely carelessly on exonerating clauses in the trust deed. On the other hand, many of the decisions having borne hardly on honest trustees, it is now provided by the Judicial Trustees Act, 1896 (*d*), that where a trustee or executor has acted honestly and reasonably, the Court may excuse and relieve him from personal liability, wholly or in part (*e*). In the exercise of its Trustees must always exercise prudence.

(*x*) *Eland* v. *Medland*, 41 Ch. D. 476; 58 L. J. Ch. 572; and see *Cocks* v. *Chapman*, (1896) 2 Ch. 763; 65 L. J. Ch. 892.

(*y*) Pp. 119 and 305.

(*z*) *Drosier* v. *Brereton*, 15 Beav. 221; *Smethurst* v. *Hastings*, 30 Ch. D. 490; 55 L. J. Ch. 173; *Chapman* v. *Browne*, (1902) 1 Ch. 785.

(*a*) *Stickney* v. *Sewell*, 1 My. & Cr. 8; *Macleod* v. *Annesley*, 10 Beav. 600.

(*b*) *Webb* v. *Jonas*, 39 Ch. D. 660; 57 L. J. Ch. 671; *Stokes* v. *Prance*, (1898) 1 Ch. 212; 67 L. J. Ch. 69.

(*c*) *Per* Lindley, L. J., in *Whiteley* v. *Learoyd*, 33 Ch. D. 347, 355; affd. 12 App. Cas. 727; 57 L. J. Ch. 390; *Knox* v. *Mackinnon*, 13 App. Cas. 753; *Rae* v. *Meek*, *sup.*

(*d*) 59 & 60 Vict. c. 35, s. 6.

(*e*) See *Mosley* v. *Keyworth*, (1897) 2 Ch. 518; 66 L. J. Ch. 759.

discretion the Court will consider each case on its merits, and it has declined to lay down general rules or principles for application (*f*), and the onus is on the trustee to establish his claim to exoneration (*g*).

Statutory powers of investment.

3. Previous to certain statutes now to be referred to, a trustee's general power of investment was exceedingly circumscribed. In fact, the tenor of some cases seems such as almost to have confined him to government or bank annuities (*h*). But it is not now necessary to consider restrictions which have long been obsolete.

Nor is it necessary to give in such detail, as in former editions of this work, the history of the increasing latitude of trust investments from time to time introduced by statute. Lord St. Leonards' Act (*i*), passed in 1859, authorised investments not only in real securities, but also in Bank of England or Bank of Ireland Stock and East India Stock. This Act was in the following year made retrospective (*k*).

30 & 31 Vict. c. 132.

Doubts having arisen as to the legal effect and signification of the words "East India Stock" in 22 & 23 Vict. c. 35, s. 32, it was by 30 & 31 Vict. c. 132, s. 1, enacted that the said words should include and express as well the East India Stock which existed previously to the 13th of August, 1859, as East India Stock charged on the revenues of India, and created under and by virtue of any Act or Acts of Parliament passed on or after that date. And the same statute authorised investments in any securities the interest of which is guaranteed by Parliament.

34 Vict. c. 27.

The Debenture Stock Act, 1871 (*l*), enabled trustees (including executors, administrators, and any other persons holding funds in a fiduciary capacity) who had power to invest in the mortgages or bonds of a railway company,

(*f*) *Barker* v. *Ivimey*, (1897) 1 Ch. 536; 66 L. J. Ch. 282. See *Clews* v. *Grindey*, (1898) 2 Ch. 593; 67 L. J. Ch. 624; *Perrins* v. *Bellamy*, (1898) 2 Ch. 521; (1899) 1 Ch. 797; 68 L. J. Ch. 397.

(*g*) *Smith* v. *Stuart*, (1897) 2 Ch. 583; 66 L. J. Ch. 780; *Chapman* v. *Browne*, (1902) 1 Ch. 785.

(*h*) *Hansom* v. *Allen*, 2 Dick. 498.

(*i*) 22 & 23 Vict. c. 35, s. 32.

(*k*) 23 & 24 Vict. c. 38, s. 12.

(*l*) 34 Vict. c. 27.

or of any other description of company, to invest in the debenture stock of a railway company, or such other company as aforesaid.

By 34 & 35 Vict. c. 47, the consolidated stock of the Metropolitan Board of Works (now replaced by the London County Council) was added to the list; and by 38 & 39 Vict. c. 83, trustees who had power to invest in the debentures or debenture stock of a company were authorised to invest in the nominal debentures or debenture stock issued by any local authority under that Act. This provision is re-enacted by sect. 5 (3) of the Trustee Act, 1893 (*m*). 34 & 35 Vict. c. 47. 38 & 39 Vict. c. 83.

By the Settled Land Act, 1882 (*n*), capital money arising under the Act may be invested in Government or other securities on which the trustees of the settlement are, by the settlement or by law, authorised to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland, incorporated by special Act of Parliament, and having for ten years next before the investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities.

The Trust Investment Act, 1889 (*o*), repealed the investment clauses of 22 & 23 Vict. c. 35, 23 & 24 Vict. c. 38, 30 & 31 Vict. c. 132, and 34 & 35 Vict. c. 47, at the same time consolidating and extending their provisions by re-enactment. But this statute has now itself been repealed by the Trustee Act, 1893 (*p*), which now regulates the whole question of trust investments, declaring in detail what securities are authorised; the principal of which are the following:—The parliamentary stocks, or public funds or Government securities of the United Kingdom; real or heritable securities in Great Britain or Ireland; the stock 52 & 53 Vict. c. 32. Trustee Act, 1893.

(*m*) 56 & 57 Vict. c. 53.
(*n*) 45 & 46 Vict. c. 38.
(*o*) 52 & 53 Vict. c. 32.
(*p*) 56 & 57 Vict. c. 53.

of the Bank of England and of the Bank of Ireland; India three and a half per cent. stock and India three per cent. stock, and any stock to be in future issued and charged on the revenues of India; securities the interest of which is guaranteed by Parliament; consolidated stock of the Metropolitan Board of Works or London County Council; debenture or rent-charge or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament and having for the ten previous years paid a dividend of not less than three per cent. on its ordinary stock; the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased for not less than 200 years at a fixed rental to any such railway company as lastly before mentioned; the debenture stock of any railway company in India the interest of which is paid or guaranteed by the Secretary of State for India; the debenture or guaranteed or preference stock of any company in Great Britain or Ireland established for the supply of water for profit and incorporated by special Act of Parliament or Royal Charter, and having for the ten previous years paid a dividend of not less than five per cent. on its ordinary stock; the nominal or inscribed stock issued by the corporation of any municipal borough having a population exceeding 50,000, or by any county council; the nominal or inscribed stock issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water and having a compulsory power of levying rates over an area containing a population exceeding 50,000. The same section empowers trustees to vary any such investments (*q*). Certain restrictions are imposed by sect. 2 of the Act as to investments in redeemable securities.

By the Trustee Act, 1894 (*r*), trustees are enabled to continue any authorised investment although since the

(*q*) See *Hume* v. *Lopes*, (1892) A. C. 112; 61 L. J. Ch. 423.
(*r*) 57 & 58 Vict. c. 10, s. 4.

investment it has ceased to be an authorised investment. But this has no retrospective action (*s*).

By the Colonial Stock Act, 1900 (*t*), trustees are empowered to invest in any Colonial stock registered in the United Kingdom under the Colonial Stock Acts, 1877 and 1892, subject to the restrictions imposed by the Trustee Act, 1893, on redeemable securities. Colonial Stock Acts.

The range of trustees' investments has thus been largely extended; but it must be observed that in all cases the statutory powers are subject to any express directions contained in the instrument creating the trust, or in any special statute particularly affecting the trust fund, as in the case of building societies (*u*); and they do not at all affect the principles by which the discretion of trustees must be guided, nor do they diminish their responsibility (*x*). Their investments must be such as are equally just to all objects of the trust. They may not show favour to a tenant for life by investing upon securities which command a higher rate of interest, in consequence of their being determinable; nor will the Court, in the absence of special circumstances, authorise a transfer from Consols into another investment producing a larger income, if it may be injurious to those in remainder. The Court will, however, be influenced by facts showing it to be for the interest of children that the income of their parents should be increased (*y*). Investments must be just to all the *cestui que trusts*.

For the remedies of a *cestui que trust* against trustees who in respect of investments or otherwise commit a breach of trust, see Sect. V., *infra*, p. 138. Remedies against trustees.

(*s*) *Cocks* v. *Chapman*, (1896) 2 Ch. 763; 65 L. J. Ch. 892.
(*t*) 63 & 64 Vict. c. 62, s. 2.
(*u*) *Re National, &c. Building Society*, 43 Ch. D. 431; 59 L. J. Ch. 403.
(*x*) *Consterdine* v. *C.*, 31 Beav. 330, 333; *Knox* v. *Mackinnon*, 13 App. Cas. 753.
(*y*) *Cockburn* v. *Peel*, 3 De G. F. & J. 170, 174.

IV. *Liability of Co-trustees.*

The case of *Townley* v. *Sherborne* (*z*) has been long referred to as a leading authority on the general liability of a trustee for the acts and defaults of his co-trustee.

Brice v. *Stokes* (*a*) illustrates the particular case of the liability which arises from the joining of trustees in giving receipts.

General rule against the liability.

The former case establishes the general principle *that a trustee is not to be held liable for the acts or defaults of a co-trustee, in which he himself has not participated.* As between co-executors also the same rule applies (*b*).

Exceptions. Negligence. Acquiescence.

There are, however, many circumstances which will take a case out of this general rule. Thus a trustee or executor who, though he has not participated in the act which has resulted in loss to the trust estate, has been guilty of negligence, or has stood by and been cognisant of without interfering with a devastavit or breach of trust committed by his co-trustee or co-executor, will be held responsible for it (*c*). In the latter of these cases, an executor, who took no active part in the trusts, was held liable for permitting his co-executor to retain the testator's moneys in a business in which the testator had been partner with the co-executor. Both had proved the will, and having thus undertaken the duty of properly attending to the trusts were bound to diligence therein. Permitting a co-executor to receive the assets and retain them in his hands without proper investment, will also render an executor liable for any loss thus incurred: proper measures ought to be promptly taken to prevent such a breach of trust (*d*).

(*z*) Bridg. Rep. 35; 2 W. & T. L. C. 870.

(*a*) 11 Ves. 319; 2 W. & T. L. C. 877.

(*b*) *Littlehales* v. *Gascoyne*, 3 Bro. C. C. 73.

(*c*) *Mucklow* v. *Fuller*, Jac. 198; *Booth* v. *B.*, 1 Beav. 125.

(*d*) *Lincoln* v. *Wright*, 4 Beav. 427; *Stiles* v. *Guy*, 1 Mac. & G. 422.

Still more certainly if a trustee or executor is guilty of any fraud in the matter of the trust, he will not be able to escape liability by throwing the blame on a colleague in the office (*e*). Fraud.

Executors being jointly responsible for the management of the funds of their testator, questions as to liability often arise when one pays over to his co-executor, or allows him to receive the whole or part of the assets, so that he acquires an exclusive control over them, and they are afterwards lost through his misconduct. The liability in these cases depends upon circumstances. Generally, if an executor thus puts the funds into the power of his co-executor, and they are lost through his bankruptcy, or are embezzled by him, the former is liable to make good the loss (*f*). And it matters not whether this power is given by an absolute payment to a co-executor, or otherwise, as by joining him in indorsing or drawing negotiable instruments (*g*). Unduly trusting co-executors.

But if, in the usual course of the management of the trust, it is *necessary* for an executor to pay over some of the assets to his colleague, if, for instance, one of them resides in a neighbourhood where a debt has to be paid, and money is remitted to him for that purpose by the other, the executor so remitting money incurs no liability (*h*). The question in such cases turns on the meaning of the word "necessity," which was discussed at length in *Gasquoine* v. *G.* (*i*), in which case it was held that the proposition laid down in *Candler* v. *Tillett* (*k*) to the effect that an executor who does an act by which his co-executor obtains sole possession of the trust fund is liable for the co-executor's misapplication of it, must be When a co-executor may be rightly trusted.

(*e*) *Butler* v. *B.*, 5 Ch. D. 554; 7 *ib.* 116; 14 *ib.* 329.

(*f*) *Townsend* v. *Barber*, 1 Dick. 356; *Langford* v. *Gascoyne*, 11 Ves. 333; *Robinson* v. *Harkin*, (1896) 2 Ch. 415; 65 L. J. Ch. 773.

(*g*) *Hovey* v. *Blakeman*, 4 Ves. 608; *Saddler* v. *Hobbs*, 2 Bro. C. C. 114.

(*h*) *Bacon* v. *B.*, 5 Ves. 331; *Joy* v. *Campbell*, 1 S. & L. 341.

(*i*) (1894) 1 Ch. 470, 475; 63 L. J. Ch. 377.

(*k*) 22 Beav. 257.

read "who unnecessarily does an act." "'Necessity' includes the regular course of business in administering property" (*l*). An executor is not liable for payment over of a fund which he had no legal right to retain (*m*).

Trustees joining in receipts.

Questions as to individual responsibility often arise in cases where joint receipts are given for trust moneys; and to determine such questions it is necessary to inquire into the circumstances of the particular case. Every case will on examination be found to fall under one or other of the following heads.

Where it is formally necessary.

(1.) If the signature of *all the trustees is formally necessary to the receipt, the signature of a trustee to whose hands the money does not come will not suffice of itself to render him liable to account for it* (*n*). It is but reasonable that in a case in which he has no power to refuse to sign, his signature should not, without more, fix him with a liability.

Executors.

And the rule as to executors is the same in similar circumstances. It is true that, inasmuch as each executor has full control over the assets of the testator, it is not so often necessary for a co-executor to join in a receipt or discharge for conformity's sake; but where, as in the case of a sale of stock standing in the names of executors, or now in the case of a sale and conveyance of land by virtue of the Land Transfer Act, 1897 (*o*), the concurrence of both is necessary, the one to whose hands the funds do not come will not necessarily be liable (*p*). But in these cases where the signing is alleged to have been for mere conformity, the burden is on a trustee seeking to clear himself, to prove that his co-trustee's were the actual hands which received the money. The signature thus creates a *primâ facie* liability in all cases (*q*).

Burden of proof on a person signing.

(*l*) *Per* Lord Cottenham, *Clough* v. *Bond*, 3 My. & Cr. 490, 496.
(*m*) *Davis* v. *Spurling*, 1 Russ. & My. 64.
(*n*) *Heaton* v. *Marriott*, cited Prec. Ch. 173; *Fellows* v. *Mitchell*, 1 P. Wms. 81.
(*o*) 60 & 61 Vict. c. 65.
(*p*) *Chambers* v. *Minchin*, 7 Ves. 186, 197.
(*q*) See *Brice* v. *Stokes*, 11 Ves. 319; *Fellows* v. *Mitchell*, *sup.*

Where the transaction is unnecessary.

Where, moreover, the *transaction of which the receipt forms part is*, as it was in *Brice* v. *Stokes* (*r*), *wholly unnecessary, and the trustee signing then permits his co-trustee to deal with the moneys contrary to the trust, he will be charged with any loss thus occasioned.* The entire transaction being unnecessary, the fact that the mere signature was for conformity is not sufficient to discharge him (*s*). It is the duty of a trustee to inquire as to the necessity of a transaction respecting the trust money; he may not escape by alleging ignorance of the state of the trust (*t*).

Trustee must inquire as to the necessity.

And similarly an executor will not be justified in those cases where his formal concurrence is necessary, in joining in a transaction upon the mere representation of his co-executor that it is necessary for the purposes of administration. He must make proper inquiries; if he does not, he will be liable for any misappropriation (*u*).

Voluntary joining in a receipt.

(2.) Where, on the contrary, a person *joins voluntarily in a receipt*, in which his concurrence is not formally requisite, such interference being unnecessary, *he is to be considered as assuming a power over the fund, and is therefore answerable for the application thereof*, as far as it is connected with the particular transaction in which he joins (*x*).

Distinction between trustees and executors.

This difference usually distinguishes the case of receipts by executors from that of receipts by trustees. In the case of trustees it is commonly requisite that all should join in order to effect a complete discharge (*y*). They are, therefore, usually not liable for moneys not coming to their hands. On the contrary, one executor being generally competent to give a valid receipt, the joining of a co-

(*r*) *Sup.* p. 132.

(*s*) See *Brice* v. *Stokes, sup.*; *Walker* v. *Symonds*, 3 Swanst. 1; *Ingle* v. *Partridge*, 32 Beav. 661.

(*t*) *Hanbury* v. *Kirkland*, 3 Sim. 265; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337; 60 L. J. Ch. 66.

(*u*) *Shipbrook* v. *Hinchinbrook*, 11 Ves. 252; 16 Ves. 477.

(*x*) See *Brice* v. *Stokes, sup.*; *Leigh* v. *Barry*, 3 Atk. 584.

(*y*) *Re Flower*, 27 Ch. D. 592; 53 L. J. Ch. 955.

executor is as a rule unnecessary; and as a rule, therefore, executors who so sign are bound by their signatures.

Exceptions.

But there are exceptions to this. Where the act of signing is merely nugatory and has not the effect of putting the trust funds in the hands of a co-executor, for instance, if he has already previously received the money, such signature will not raise a liability (*z*). This is a very extensive exception, and reduces the rule almost to this, that the question really to be decided is whether the money was ever under the control of both executors (*a*).

General conclusion.

The general conclusion, then, as to the receipts of executors seems to be, that where funds belonging to executors are not under the separate control of each, although one of them joins with his co-executor in any act or receipt which will have the effect of putting the funds into his hands, as the joining is absolutely necessary, and is not therefore evidence that the executor so joining thereby assumes a control over the fund, the principle which governs the case of trustees will be applicable, and he will not be liable, if he has used due caution, for the misapplication of the fund by his co-executor (*b*). Its rules, applicable to executors, apply equally to administrators (*c*).

It is scarcely necessary to say that no rule in favour of the exoneration of an executor has application when a case of wilful default is made out against him. A debt from a co-executor to the trust estate must be recovered just as any other outstanding asset (*d*). His personal security is no more warrantable than that of another. Such cases fall under the principles already enounced as to the custody and investment of trust property.

Indemnity clauses.

An express clause was formerly usually inserted in trust deeds, providing that one trustee should not be answer-

(*z*) *Westley* v. *Clarke*, 1 Eden, 357.
(*a*) *Joy* v. *Campbell*, 1 S. & L. 341.
(*b*) *Hovey* v. *Blakeman*, 4 Ves. 596, 608.
(*c*) *Willand* v. *Fenn*, cited *Jacomb* v. *Harwood*, 2 Ves. 267.
(*d*) *Stiles* v. *Guy*, 1 Mac. & G. 422.

able for the receipts, acts, or defaults of his co-trustees. Equity infused such a proviso into every trust deed, whether expressed or not (*e*), and no better right was given by the expression of that which if not expressed was implied (*f*). By Lord St. Leonards' Act (*g*), s. 31, the use of such indemnity and reimbursement clauses was rendered unnecessary, though of course it was open to a testator to give a wider right to indemnity than that expressed in the statute, as, for instance, by expressly authorising each trustee to delegate his duties to another; and full effect would be given to such a clause by the Court (*h*). And now by the Trustee Act, 1893 (*i*), it is further enacted that a trustee shall, without prejudice to the provisions of the instrument creating the trust, be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt *for the sake of conformity*, and shall be answerable and accountable only for his own acts, receipts, neglects and defaults, and not for those of any other trustee, nor for any banker, broker or other person with whom any moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default. The protection previously dependent on decision thus receives statutory authority. It is often found difficult to establish a case of wilful default (*k*). The powers given under the Judicial Trustees Act, 1896 (*l*), to relieve against innocent breaches of trust have already been considered (*m*).

22 & 23 Vict. c. 35, s. 31.

Trustee Act, 1893.

Independently also of any express indemnity, a trustee who accepts office at the request of a *cestui que trust* is entitled to be indemnified by him personally against any

(*e*) *Dawson* v. *Clarke*, 18 Ves. 254.
(*f*) *Worrall* v. *Harford*, 8 Ves. 4, 8; *Rehden* v. *Wesley*, 29 Beav. 213.
(*g*) 22 & 23 Vict. c. 35.
(*h*) *Wilkins* v. *Hogg*, 3 Giff. 116; *Pass* v. *Dundas*, 29 W. R. 332.
(*i*) 56 & 57 Vict. c. 53, s. 24.
(*k*) *Cooke* v. *Stevens*, (1898) 1 Ch. 162; (1897) 1 Ch. 472; 67 L. J. Ch. 118; *Re Brier*, 26 Ch. D. 238, 243.
(*l*) 59 & 60 Vict. c. 35.
(*m*) *Sup.* p. 127.

loss which may accrue in the proper execution of the trust; for instance, if he is made contributory on the failure of a company in which he rightly holds shares in the character of trustee (*n*).

V. *Remedies of a* Cestui que Trust.

i. *Following the Trust Estate.*
ii. *Personal Remedies.*
iii. *Removal of Trustees.*

Following trust property.

I.—1. One of the most conspicuous and instructive authorities as to the principles on which equity acts in assisting a *cestui que trust* to follow and recover trust property which has been wrongfully disposed of by a trustee, is the case of *Thorndike* v. *Hunt* (*o*).

In this case a trustee, on being ordered to pay into Court a sum of stock representing a trust fund belonging to T., which he had appropriated to his own use, paid into Court, in compliance with this order, a sum of stock belonging to another *cestui que trust*, B. The question was, whether B. had a right to follow this fund as against T. It was held, that B. had no such right. Their equities were equal; and the Court having acquired the legal interest on behalf of T.'s estate, this was deemed to create a sufficient preference in T.'s favour (*p*), the transfer being for valuable consideration and without notice.

From this reasoning and the authorities bearing on this case, may be deduced the following rules as to the following of trust property:—

(1.) If the fund comes into the hands of a volunteer,

(*n*) *Jervis* v. *Wolferstan*, 18 Eq. 18.
(*o*) 3 De G. & J. 563.
(*p*) See also a similar recent case, *Taylor* v. *Blacklock*, 32 Ch. D. 560; 55 L. J. Ch. 97; *Taylor* v. *L. & Coy. Bank*, (1901) 2 Ch. 231; 70 L. J. Ch. 477.

that is, without the payment of valuable consideration, then *whether or not the holder had notice* of the trust, the fund may be followed and reclaimed by the *cestui que trust* (*q*).

(2.) If it is in the hands of a purchaser for value, *with notice* of the trust, then also the fund may be followed; for the payment, being made with his eyes open, is deemed to be made voluntarily (*r*).

(3.) But if the holder of the fund is a *bonâ fide* purchaser for value *without notice*, then his title cannot be impeached, as is seen by the principal case, above referred to (*s*). And where a trustee paid trust money to the credit of his private bank account, and drew on it, the bankers, having no notice of the breach of trust, were held not liable to the *cestuis que trust* (*t*).

The replacing of trust funds out of the trustee's own property, even though on the eve of bankruptcy, is not impeachable as a fraudulent preference, the motive being not to prefer one creditor above others, but to secure protection against the penal consequences of a breach of trust (*u*).

The student is referred to a later page (p. 347 *et seq.*) for a more detailed consideration of the protection which may be secured to a purchaser by the acquisition of the legal estate, than would at this stage of the subject be desirable. Here, it may suffice to say, generally, that no party to a fraudulent bargain will be suffered to derive any benefit from it, and that all persons who obtain possession of trust funds with knowledge that their title is derived from a breach of trust, will be compelled to restore such trust funds (*x*).

2. Another class of considerations arises when the trust Conversion of trust fund.

(*q*) *Mansell* v. *M.*, 2 P. Wms. 681.

(*r*) *Boursot* v. *Savage*, 2 Eq. 134.

(*s*) And see *Pilcher* v. *Rawlins*, 7 Ch. 259.

(*t*) *Coleman* v. *Bucks, &c. Bank*, (1897) 2 Ch. 243; 66 L. J. Ch. 564.

(*u*) *New's Trustee* v. *Hunting*, (1897) 2 Q. B. 19; 66 L. J. Q. B. 554; *Sharp* v. *Jackson*, (1899) A. C. 419; 68 L. J. Q. B. 866.

(*x*) See Lewin on Trusts, 10th ed. p. 1052; *Gray* v. *Lewis*, 8 Eq. 526.

fund has been not only appropriated but converted by the trustee into property of another form; as, for instance, where trust money has been laid out in land, or trust land converted into money. In such cases the general rule is, that the *cestui que trust* may attach and follow the property that has been substituted for the trust estate, so long as its metamorphoses can be traced.

As long as the property is in the hands of the trustee in any form no difficulty arises. A trustee that mixes trust moneys with his own is clearly liable to the *cestui que trust* for so much of the blended fund as he cannot prove to be his own (*y*). So, if the trustee purchases land partly with his own money and partly with trust money, the *cestui que trust* has clearly a lien on the whole estate for the amount of his fund (*z*).

Difficulties, however, often arise when the trust property has found its way in another form into the hands of a third person. In such cases the principle above enounced applies; the fund can be followed as long as it can be identified, in the hands of any one who has notice of the trust. There is no distinction in principle between money in the form of coin and money in the form of notes or bills; but obviously, in the former case, the task of identification is so difficult as to be possible only under particular circumstances (*a*).

If a trustee mixes trust funds with his own in the hands of a banker, and draws on the combined account, his drawings will be attributed to his private moneys, so as to leave the trust moneys intact (*b*). If he mixes two trust

(*y*) *Fellows* v. *Mitchell*, 1 P. Wms. 83; *Mason* v. *Morley*, 34 Beav. 475.

(*z*) *Lane* v. *Dighton*, Amb. 409; *Hopper* v. *Conyers*, 2 Eq. 549; *Worcester Bank* v. *Blick*, 22 Ch. D. 255; 52 L. J. Ch. 288.

(*a*) *Ford* v. *Hopkins*, 1 Salk. 283; *Harris* v. *Truman*, 7 Q. B. D. 340; 9 *ibid.* 264; 51 L. J. Q. B. 338; *Thomson* v. *Clydesdale Bank*, (1893) A. C. 282; 62 L. J. P. C. 91; *Re Hallett & Co.*, (1894) 2 Q. B. 237; 63 L. J. Q. B. 573.

(*b*) *Re Hallett's Estate*, 13 Ch. D. 696, overruling *Pennell* v. *Deffell*, 4 De G. M. & G. 772, *infra*, p. 542; *Hancock* v. *Smith*, 41 Ch. D. 456; 58 L. J. Ch. 735; *Wood* v. *Stenning*, (1895) 2 Ch. 433.

funds in his bank account, then the sums drawn out will, in the absence of evidence to the contrary, be attributed in order to the earliest deposits, in accordance with a rule which will elsewhere be more fully considered (*b*).

Breach of trust a simple contract debt.

II. **Personal remedies.**—(1.) A breach of trust by a trustee creates an obligation of the nature of a debt to the *cestui que trust*. Notwithstanding the acceptance of the trust by deed, such a debt ranks only as a simple contract debt, unless the deed contains a covenant, express or implied, for payment of the trust fund, and has been executed by the trustee (*c*). The Statutes of Limitation applicable in the case of actions against trustees are considered *infra*, p. 145.

Generally proceedings in equity against trustees or their representatives.

Proceedings in equity in respect of a breach of trust may be taken not only against trustees or executors, but also against their representatives, even though the loss may not have occurred until after the death of such trustees (*d*), and although they may have distributed the assets without notice of the breach of trust, unless they have done so by order of the Court (*e*), or pursuant to 22 & 23 Vict. c. 35, s. 29. But in order to make a retiring trustee answerable for a breach of trust committed by his successor, it must be shown that the particular breach of trust was actually contemplated by the former trustee when the retirement took place (*f*).

Effect of decree.

Where several trustees are all guilty of a breach of trust, although the *cestui que trust* may have obtained a decree against them jointly, its effect is several also, and he may proceed to take out execution against any one of them alone (*g*); but as between the trustees themselves, any one so paying is entitled to contribution, which may

Contribution.

(*b*) See note (*b*), *ante*, p. 140.

(*c*) *Isaacson* v. *Harwood*, 3 Ch. 225; *Richardson* v. *Jenkins*, 1 Drew. 477.

(*d*) *Devaynes* v. *Noble*, 24 Beav. 86.

(*e*) *March* v. *Russell*, 3 My. & Cr. 31; *Taylor* v. *T.*, 10 Eq. 477.

(*f*) *Head* v. *Gould*, (1898) 2 Ch. 250; 67 L. J. Ch. 480; *Re Salmon*, 42 Ch. D. 351.

(*g*) *Exp. Shakeshaft*, 3 Bro. C. C. 197; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337; 60 L. J. Ch. 66.

in a proper case be ordered in the same suit (*h*). Contribution was refused where a trustee was at the same time *cestui que trust*, and had received exclusive benefit from the breach of trust (*i*). As between the trustees themselves the loss may be thrown primarily upon the trustee most in fault, or his estate (*k*), as for instance where a lay trustee has relied on his colleague, a solicitor, and been misled (*l*).

Cestui que trust acquiescing in breach of trust.

Where a *cestui que trust* derives any profit from a breach of trust, he will to that extent be bound to recoup the trustee (*m*); and if a *cestui que trust*, with knowledge of the fact, receives the income from an improper investment, he is bound to give credit for the difference between it and the income which would have arisen from a proper investment of the trust fund (*n*). And where a trustee commits a breach of trust at the instigation or request, or with the consent in writing of a beneficiary, the Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman restrained from anticipation, impound all or any part of the beneficiary's interest in the trust property by way of indemnity to the trustee or person claiming through him (*o*). And here it should be observed that the words "in writing" apply only to the consent. An instigation or request need not be in writing (*p*), but the beneficiary must have been aware at least of the facts constituting the breach of trust (*q*), if not of their legal effect. The power of the Court is discretionary, and it will be slow to exercise it by removing the restraint on anticipation in the case of a married woman, it being the

(*h*) *Priestman* v. *Tindall*, 24 Beav. 244; *Robinson* v. *Harkin*, (1896) 2 Ch. 415; 65 L. J. Ch. 773.

(*i*) *Chillingworth* v. *Chambers*, (1896) 1 Ch. 685; 65 L. J. Ch. 343.

(*k*) *Fetherstone* v. *West*, 6 I. R. Eq. 86.

(*l*) *Lockhart* v. *Reilly*, 25 L. J. Ch. 697; *Barker* v. *Ivimey*, (1897) 1 Ch. 536; 66 L. J. Ch. 232.

(*m*) *Trafford* v. *Boehm*, 3 Atk. 440; *Chillingworth* v. *Chambers*, *sup.*

(*n*) *Davies* v. *Hodgson*, 25 Beav. 177.

(*o*) 56 & 57 Vict. c. 53, s. 45.

(*p*) *Griffith* v. *Hughes*, (1892) 3 Ch. 105; 62 L. J. Ch. 135.

(*q*) *Somerset* v. *Poulett*, (1894) 1 Ch. 231, 274; 63 L. J. Ch. 41.

duty of her trustee to protect her against herself if she requests a breach of trust (*r*).

(2.) When a trustee becomes bankrupt, what he owes to the trust may be proved against his estate (*s*), deducting, however, the value of any beneficial interest which he himself may have in the trust estate (*t*). Although the original debt is barred when a bankrupt trustee obtains his order of discharge (*u*), nevertheless it having been the trustee's duty to prove the debt for the benefit of the *cestui que trust*, he will, if he has neglected so to do, be liable for the consequent loss, notwithstanding his discharge (*x*). The original debt is not indeed revived, but a fresh liability springs from the negligent breach of trust. Where all the trustees are bankrupt, proof may be made against the estates of all, provided that not more than 20*s.* in the pound is recovered (*y*).

Bankruptcy of trustee.

Neglect to prove.

(3.) If trustees are *expressly* bound by the terms of their trust to invest money in the public funds, and, instead of doing so, retain it in their own hands, the *cestui que trust* may elect to charge them either with the amount of money, or with the amount of stock they might have purchased therewith (*z*). An executor, however, so retaining money will only be charged with simple interest at four per cent., unless there are circumstances showing that he has profited by his misconduct (*a*).

Remedy for neglect to invest.

If trustees are directed to invest on *Government or real securities*, and they do neither, the *cestui que trust* has not the option of charging them with the moneys which would have been produced by an investment in the funds; he is only entitled to his trust fund with four per cent.

(*r*) *Bolton* v. *Curre*, (1895) 1 Ch. 544; 64 L. J. Ch. 164; *Mara* v. *Browne*, (1895) 2 Ch. 69; 64 L. J. Ch. 594.

(*s*) *Exp. Shakeshaft*, 3 Bro. C. C. 197.

(*t*) *Exp. Turner*, 2 De G. M. & G. 927.

(*u*) *Exp. Holt*, 1 Deac. 248.

(*x*) *Orrett* v. *Corser*, 21 Beav. 52.

(*y*) *Keble* v. *Thompson*, 3 Bro. C. C. 112.

(*z*) *Shepherd* v. *Mould*, 4 Ha. 500, 504.

(*a*) *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 843; and see *Powell* v. *Hulkes*, 33 Ch. D. 552; 55 L. J. Ch. 846.

interest (*b*). But a trustee will be charged with more than four per cent. on money in his hands where he has actually received (*c*) or may be presumed to have received more, for instance, by employing the money in business (*d*); or where, but for mismanagement, more might have been received.

Trustee may not set off profits against losses.

If there are several distinct unauthorised investments by trustees, in some of which a loss is incurred, and, in others, a gain accrues, they may not set off the gain against the loss. The *cestui que trust* may retain the gain, and still claim to have the loss made good (*e*).

Remedy of *cestui que trust* when barred by acquiescence, concurrence, or release.

(4.) The remedy of a *cestui que trust* who is *sui juris* may be barred by his acquiescence, or concurrence, or by his executing a release (*f*). But persons under disability do not so lose their remedy unless they have by their own fraud induced the breach of trust (*g*). A married woman, however, being treated as a *feme sole* as regards her separate estate, may bind it by her concurrence in a breach of trust (*h*), unless she was either herself deceived, or under undue influence (*i*), or was restrained from anticipation (*k*). Reference has already been made to the discretionary power of the Court to impound a married woman's interest notwithstanding restraint on anticipation, where she has instigated or consented to a breach of trust (*l*).

Misrepresentation or concealment on the part of trustees will prevent their defending themselves on the ground of the *cestui que trust's* acquiescence (*m*). And mere con-

(*b*) *Robinson* v. *R.*, 1 De G. M. & G. 247; *Marsh* v. *Hunter*, 6 Mad. 295; cf. *Shepherd* v. *Mould*, 4 Ha. 500; Lewin, p. 377, ed. 10.

(*c*) *Emmet* v. *E.*, 17 Ch. D. 142.

(*d*) *Jones* v. *Foxall*, 15 Beav. 392.

(*e*) *Robinson* v. *R.*, 11 Beav. 371, 375.

(*f*) See *Brice* v. *Stokes*, 11 Ves. 319; *Walker* v. *Symonds*, 3 Swanst. 1, 64.

(*g*) *Montfort* v. *Cadogan*, 19 Ves. 635, 639, 640; *Wilkinson* v. *Parry*, 4 Russ. 272, 276; *Savage* v. *Foster*, 9 Mod. 35.

(*h*) *Clive* v. *Carew*, 1 J. & H. 199.

(*i*) *Whistler* v. *Newman*, 4 Ves. 129.

(*k*) *Cocker* v. *Quayle*, 1 Russ. & My. 535; *Ellis* v. *Johnson*, 31 Ch. D. 537; 55 L. J. Ch. 325.

(*l*) *Sup.* p. 142.

(*m*) *Walker* v. *Symonds*, *sup.*

nivance of a *cestui que trust* at a breach of trust from which he derives no benefit, will not prevent his complaining of the transaction long after he first discovered it (*n*).

Statutes of Limitation.

We have seen (*o*) that the remedy against a constructive trustee is, in the absence of fraud, liable to be barred by the old statute of limitations (*p*) after six years. But apart from recent legislation there was no such limitation of the remedy as against an express trustee. The Judicature Act, 1873 (*q*), provided expressly that no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, should be barred by any statute of limitation. But the position of trustees in this respect has now been alleviated by the Trustee Act, 1888 (*r*), which enacts that in any action (commenced after the 1st January, 1890) against a trustee, *except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his own use*, all rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action if the defendant had not been a trustee; and further, that if the action is brought to recover money or other property, and is one to which no existing statute of limitations applies, the defendant shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received; but so, nevertheless, that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until his

(*n*) *Phillipson* v. *Gatty*, 7 Hare, 516.
(*o*) *Sup.* p. 96.
(*p*) 21 Jac. I. c. 16.
(*q*) 36 & 37 Vict. c. 66, s. 25 (2).
(*r*) 51 & 52 Vict. c. 59, s. 8.

interest is in possession. This section applies to an executor or administrator, and to a trustee who is such by construction or implication of law, but not to the official trustee of charitable funds. A director of a company has been held to be within the definition (*s*). A trustee in bankruptcy is not (*t*). To exclude a trustee from the benefit of the Act on the ground of fraud, moral complicity must be established against him; the fraud of his agent, for example, is not sufficient; and time runs from the date of the breach of trust, not of its discovery (*u*). The cases referred to below illustrate the application of the Act in various circumstances (*x*).

The execution of a release or confirmation will not prevent a *cestui que trust* from taking action unless he has full knowledge of the facts of the case (*z*) and of their legal effect (*a*).

(5.) Fraudulent breaches of trust are not only actionable but also indictable (*b*), after leave obtained from the Attorney-General or from the judge before whom any civil proceedings respecting the trust have been taken (*c*).

Jurisdiction to remove trustees.

III. **Removal of Trustees.**—Although, on the one hand, a trustee who accepts a trust cannot at will relinquish the office, unless, indeed, the instrument creating the trust confers a special power so enabling him; and, on the other hand, a *cestui que trust* has no power, at his mere will, to dismiss a trustee from his office: the Court has ample authority and an inherent jurisdiction to remove any

(*s*) *Re Lands Allotment Co.*, (1894) 1 Ch. 616; 63 L. J. Ch. 291.

(*t*) *Re Cornish*, (1895) 2 Q. B. 634; (1896) 1 Q. B. 99; 65 L. J. Q. B. 106.

(*u*) *Thorne* v. *Heard*, (1895) A. C. 495; 64 L. J. Ch. 652; *Moore* v. *Knight*, (1891) 1 Ch. 547; 60 L. J. Ch. 271.

(*x*) *Andrew* v. *Cooper*, 45 Ch. D. 444; 59 L. J. Ch. 815; *How* v. *E. of Winterton*, (1896) 2 Ch. 626; 65 L. J. Ch. 832; *Jones* v. *Morgan*, (1893) 1 Ch. 304; 62 L. Ch. 592; *Mason* v. *Mercer*, (1893) 1 Ch. 590; *Soar* v. *Ashwell*, (1893) 2 Q. B. 390; *Swain* v. *Bringeman*, (1891) 2 Ch. 333; 61 L. J. Ch. 20; *Ellis* v. *Roberts*, (1898) 2 Ch. 142; 67 L. J. Ch. 507; *Nixon* v. *Smith*, (1902) 1 Ch. 176.

(*z*) *Randall* v. *Errington*, 10 Ves. 423.

(*a*) *Cockerell* v. *Cholmeley*, 1 Russ. & My. 425.

(*b*) 24 & 25 Vict. c. 96.

(*c*) S. 80. See 53 & 54 Vict. c. 71, s. 27.

difficulty which might arise in the administration of the trust through the unwillingness or unfitness of the trustee. In exercising this jurisdiction, the interests of the beneficiaries are the primary and paramount consideration.

A trustee will be removed and another appointed in his place, whenever such a step is desirable for the welfare of the trust estate (*d*). This jurisdiction will not, however, be exercised at the mere caprice of a *cestui que trust* (*e*), nor on the ground of an honest exercise of discretion in a manner which may prove to be prejudicial to the *cestui que trust* (*f*), nor even for mistake in the execution of his duty (*g*); a reasonable cause for such interference must be shown.

When exercised.

Apart from the statutory powers presently to be referred to, it was considered a sufficient cause that the trustee had permanently departed out of the jurisdiction of the Court (*h*); that he had become bankrupt (*i*); that he had dealt with the trust property for his own advancement (*k*); or suffered a co-trustee to commit a breach of trust (*l*); or absconded on a charge of forgery (*m*); or, to speak generally, had been guilty of such acts or omissions as endanger the trust property, or show a want of honesty or of proper capacity to execute the duties (*n*). Under such circumstances the Court may not only remove a trustee, but fix him with the costs of such removal, and the appointment of a successor (*o*).

Principles guiding appointment of new trustees.

Where the Court so interferes it will proceed to appoint new trustees to fill the office, and in so doing will be guided (1) by the wishes of the creator of the trust, if ascertain-

(*d*) Story's Eq. Jur. s. 1287; *Letterstedt* v. *Broers*, 9 App. Cas. 371.
(*e*) *O'Keefe* v. *Calthorpe*, 1 Atk. 18.
(*f*) *Lee* v. *Young*, 2 Y. & C. C. C. 532.
(*g*) See *Att.-Gen.* v. *Coopers' Co.*, 19 Ves. 192.
(*h*) *O'Reilly* v. *Alderson*, 8 Hare, 101.
(*i*) *Bainbridge* v. *Blair*, 1 Beav. 495; *Re Barker's Trusts*, 1 Ch. D. 43; and see B. A. 1883 (46 & 47 Vict. c. 52), s. 147.
(*k*) *Exp. Phelps*, 9 Mod. 357.
(*l*) *Exp. Reynolds*, 5 Ves. 707.
(*m*) *Millard* v. *Eyre*, 2 Ves. jr. 94.
(*n*) Story's Eq. Jur. s. 1289.
(*o*) *Exp. Greenhouse*, 1 Mad. 92.

able; (2) by a due regard for the interests of all parties concerned, not favouring any particular class; and (3) by the nature of the trust and the question by whose instrumentality it can best be carried into execution (*p*).

New trustees appointed under statutory powers.

But this jurisdiction, though sufficiently wide, could only be exercised after the bringing of an action for the purpose by or on behalf of the *cestuis que trusts;* and it has been found convenient to provide by statute a more swift and economical method of removing and replacing trustees. Accordingly, by the Trustee Act, 1850 (*q*), the Court was empowered, on petition without action brought, to remove a trustee and appoint others.

Trustee Act, 1893.

But the necessity for applying to the Court at all has been greatly reduced by the extensive facilities for the appointment of new trustees afforded by the Trustee Act, 1893 (*r*), which continues and extends the similar remedies previously provided by the Conveyancing Acts, 1881 (*s*), 1882, and 1892 (*t*), and by the Trustee Act, 1850 (*q*), and the Trustee Extension Act, 1852 (*u*). By this Act it is provided, that when a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred upon him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee may, by writing, appoint another person or other persons to be a trustee or

(*p*) *Re Tempest*, 1 Ch. 485; Lewin, Tr. 1035, ed. 10.
(*q*) 13 & 14 Vict. c. 60.
(*r*) 56 & 57 Vict. c. 53, ss. 10—12, 25—41.
(*s*) 44 & 45 Vict. c. 41.
(*t*) 45 & 46 Vict. c. 39; 55 & 56 Vict. c. 13.
(*u*) 15 & 16 Vict. c. 55.

trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable as aforesaid; and the Act further provides for the vesting of the trust property in the new trustees, or in them jointly with the continuing trustees, as the case may require. In appointments under this Act the number of trustees may be increased, or separate sets of trustees may be appointed for distinct parts of the trust property, and it is not obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but except where only one trustee was originally appointed a trustee may not be discharged from his trust unless there will be at least two trustees to perform the trust. This enactment removes many difficulties which had arisen under the previous law (*x*). On points arising in its administration reference may be made to the cases noted below (*y*).

Judicial Trustees Act, 1896.

Again, by the Judicial Trustees Act, 1896 (*z*), the Court is empowered on the application of the person creating a trust, or of a trustee or beneficiary, to appoint a judicial trustee of that trust, either jointly with another person or as sole trustee, and if sufficient cause is shown in place of all or any existing trustees. An executor or administrator is a trustee within the meaning of this Act, which further provides for an annual audit of and report on the judicial trustee's accounts, and, if necessary, for inquiry into his administration of the trust. The power is exerciseable not of right but in the discretion of the Court (*a*).

(*x*) See *Savile* v. *Couper*, 36 Ch. D. 520; 56 L. J. Ch. 980; *Re Moss's Trusts*, 37 Ch. D. 513; 51 L. J. Ch. 423; *Birchall* v. *Ashton*, 40 Ch. D. 436.

(*y*) *Payne* v. *Stamford*, (1896) 1 Ch. 288; 65 L. J. Ch. 134; *Re Wheeler and De Rochow*, (1896) 1 Ch. 315; 65 L. J. Ch. 219; *Summers* v. *Barrow*, (1901) 1 Ch. 259; 70 L. J. Ch. 229.

(*z*) 59 & 60 Vict. c. 35.

(*a*) *Re Ratcliff*, (1892) 2 Ch. 352; and see Rules under the Act, 1897 and 1899.

Provisions for the relief of trustees.—This is a convenient place in which to mention certain provisions for the protection and relief of trustees who are embarrassed in the execution of their trusts.

Statutory provisions for the relief and guidance of trustees.

From time to time (*b*) provisions have been made by statute for the assistance of trustees in the administration of their trusts, empowering them to procure by petition the advice and direction of the Court on matters of minor importance, or in cases of disputed construction or other questions of difficulty to pay or transfer the fund into Court, whereupon the trustee is discharged from his duties and responsibilities in respect of such funds. Such applications are now made under Ord. LV. of the Rules of Court; by summons if the fund does not exceed 1,000*l.*; if otherwise, by petition.

Judicature Act, 1873, O. LV.

Under the same order trustees or executors may apply by originating summons for the determination of any question arising in the administration of the estate or trust.

Action for administration.

And, finally, it is open to trustees in a proper case to throw the whole onus of the administration of the estate or trust on the Court by the commencement of an action for that purpose, either by writ or by originating summons, under Ord. LV. r. 4.

(*b*) See 22 & 23 Vict. c. 35, s. 30; 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74.

VI. *Remuneration of Trustees.*

i. *General principle.*
ii. *Limits of the principle.*
iii. *To whom it applies.*

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i. *General principle.*

The leading case of *Robinson* v. *Pett* (*c*) is usually cited as establishing the rule that a Court of Equity will not allow an executor or trustee to claim payment for his time and trouble in executing his trust, especially when an express legacy is provided for his pains.

It is a well-established principle in equity that a trustee shall not be permitted to profit by his trust, and one of the most important deductions therefrom is the rule illustrated by this case.

The acceptance of the office of trustee being optional, no hardship is occasioned by requiring that the performance of its duties shall be gratuitous; while if remuneration was allowed, it is evident that it would be difficult if not impossible to keep it within reasonable bounds, and to prevent the frequent and excessive burdening of trust estates.

The rule thus enunciated is sufficiently simple, but in order to an adequate appreciation of its scope it is necessary to observe carefully some instances of its application to the ever-varying circumstances which occur in practice. The first inquiry will be, What are the limits of the application of the principle? Secondly, To what persons does it extend?

(*c*) 3 P. Wms. 249; 2 W. & T. L. C. 207.

ii. *The limits of the application of the principle.*

Extent of the trouble and of the benefit resulting immaterial.

1. It matters not to what extent the trustee may have devoted himself to the duties of the trust, or to what extent the trust has been thereby benefited. As we shall presently see, he is entitled to be repaid pecuniary expenses actually and properly incurred, but though he may have even carried on a trade or business at a great sacrifice of time and thought, he can claim no compensation for his personal trouble or loss of time (*d*).

Indirect or collateral benefits not allowed.

2. Not only is a trustee not entitled to direct remuneration for time and trouble devoted to the trust, but he is not suffered by any indirect or collateral means to obtain an advantage out of his position. Two extensive classes of cases coming under this head have already been considered in dealing with constructive trusts, where we have seen that a trustee is disabled from taking advantage of his position to benefit himself by means of any dealings with the trust estate or with his *cestui que trust*. But the cases go farther than that. Thus, though the legal estate in land is vested in a trustee, it has been held that he cannot by means thereof claim the right of sporting over the land. If the sporting could be let for the benefit of the *cestui que trust*, it should be; if not, the game would belong to the heir (*e*). A trustee cannot sell his office. If he attempts to do so, any money so paid to him will be considered part of the trust fund (*f*).

Such as sporting over trust estate.

Selling his office.

Being appointed receiver with a salary.

A trustee also will not in general be appointed receiver with a salary (*g*), but the rule is not inflexible and he may be so employed in a proper case, or if no one else can be procured who will act with the same benefit to the estate (*h*). Where a trustee offered to act as receiver

(*d*) *Brocksopp* v. *Barnes*, 5 Madd. 90; *Barrett* v. *Hartley*, 2 Eq. 789.

(*e*) *Webb* v. *E. of Shaftesbury*, 7 Ves. 480, 488.

(*f*) *Sugden* v. *Crossland*, 3 Sm. & G. 192.

(*g*) *Anon.*, 3 Ves. 515; *Nicholson* v. *Tutin*, 3 K. & J. 159.

(*h*) *Sykes* v. *Hastings*, 11 Ves. 363, 364; *Bignell* v. *Chapman*, (1892) 1 Ch. 59; 61 L. J. Ch. 334.

without a salary, his appointment was expressed to be only on the ground that it was for the benefit of the estate, because it is a trustee's duty to see critically that the receiver does his duty (*i*).

He may not use the trust funds for his benefit.

3. Nor can a trustee utilise the trust funds in any way for his own benefit. If he improperly retains such in his own hands, even though it be not shown that he made any profit thereby, he will be charged with interest thereupon (*k*). If he employs them in any trade or adventure of his own, the *cestui que trust* may either insist on having the profits made by such trade or on having the trust fund replaced with interest (*l*). Thus if the adventure be successful the *cestui que trust* gets all the benefit; if it fail the trustee must account for the fund with interest, ordinarily at 4 per cent., but not limited thereto (*m*). Should a difficulty arise in any case as to the tracing and apportioning of the profits derived by a trustee or executor from the employment of trust funds together with his own in any trade or speculation, it may be a reason for preferring a fixed rate of interest to an account of the profits; and it seems that the usual rate in such cases would be 5 per cent. with yearly rests; *i.e.* compound interest (*n*). For further review of a trustee's liability in respect of investments, see *supra*, pp. 124—131.

Such being the general doctrine in its full extent, we now inquire what allowances to trustees are not deemed to be profits within the meaning of the rule, and also what circumstances may suffice to raise exceptions to the rule.

But trustees are allowed out of pocket expenses,

4. Trustees are allowed all proper expenses out of pocket, whether provided for in the instrument creating

(*i*) *Hibbert* v. *Jenkins*, 11 Ves. 363, cited.
(*k*) *Pearse* v. *Green*, 1 J. & W. 135; *Blogg* v. *Johnson*, 2 Ch. 225, 229.
(*l*) *Docker* v. *Somes*, 2 My. & K. 655; *Townend* v. *T.*, 1 Giff. 201.
(*m*) *Tebbs* v. *Carpenter*, 1 Madd. 290; *Forbes* v. *Ross*, 2 Cox, 116.
(*n*) *Jones* v. *Foxall*, 15 Beav. 392; *Davis* v. *D.*, (1902) 2 Ch. 314. But see *Emmet* v. *E.*, 17 Ch. D. 142; 50 L. J. Ch. 341.

the trusts or not (*o*), and none the less that remuneration for their trouble has been allowed them by the author of the trusts (*p*). Thus they are allowed travelling expenses (*q*); law expenses (*r*), unless they were improper, or the litigation arose from their own fault or negligence (*s*); all necessary and proper expenses incurred in protecting the trust property, for instance, by a proper insurance against loss by fire (*t*), or by watching or opposing a bill in Parliament (*u*); all proper outlay for the improvement of the property, with interest thereon (*x*), for paying off of incumbrances thereon (*y*), or defending the title thereof (*z*). They are also entitled to be indemnified by their *cestui que trust* from any liability arising from their holding shares in his name (*a*), and from the costs of any action commenced against them in their fiduciary character or in relation to the trust estate (*b*).

properly incurred,

and are entitled to indemnity for liabilities incurred.

Lien for expenses

Not only is a trustee entitled to such expenses, but he has a lien on the trust estate to secure them, which must be satisfied before the *cestui que trust* can compel a reconveyance from the trustees (*c*). Such lien has priority over the costs of a suit for the administration of the trust fund (*d*) and prevails against the trustee in bankruptcy of the *cestui que trust* (*e*). If the trust estate no longer

and priority.

(*o*) *Hide* v. *Haywood*, 2 Atk. 126; *Worrall* v. *Harford*, 8 Ves. 4, 8; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24.

(*p*) *Wilkinson* v. *W.*, 2 S. & S. 237.

(*q*) *Exp. Lovegrove*, 3 D. & C. 763.

(*r*) *Poole* v. *Pass*, 1 Beav. 600; *Amand* v. *Bradbourne*, 2 Ch. Ca. 138.

(*s*) *Peers* v. *Ceeley*, 15 Beav. 209; *Caffrey* v. *Darby*, 6 Ves. 488; *Malcolm* v. *O'Callaghan*, 3 My. & C. 52; *Merry* v. *Pownall*, (1898) 1 Ch. 306; 67 L. J. Ch. 162.

(*t*) 56 & 57 Vict. c. 53, s. 18.

(*u*) *Bright* v. *North*, 2 Ph. 216.

(*x*) *Quarrel* v. *Beckford*, 1 Madd. 269, 282.

(*y*) *Balsh* v. *Higham*, 2 P. Wms. 453.

(*z*) *Sandon* v. *Hooper*, 6 Beav. 246.

(*a*) *James* v. *May*, L. R. 6 H. L. 328.

(*b*) *Benett* v. *Wyndham*, 4 De G. F. & J. 259; *Att.-Gen.* v. *M. of Norwich*, 2 My. & Cr. 406.

(*c*) *Re Exhall Coal Co.*, 35 Beav. 449.

(*d*) *Morison* v. *M.*, 7 De G. M. & G. 214, 226.

(*e*) *Re Holden*, 20 Q. B. D. 43; 57 L. J. Q. B. 47; *Merry* v. *Pownall*, *sup.*

exists the trustees may proceed against the *cestui que trust* personally (*f*).

When agents may be employed.

5. Though the office of trustee, being one of personal confidence, cannot be delegated, trustees may in special cases employ agents, whose expenses will be allowed out of the estate. Thus, upon making out a proper case, a trustee may employ a bailiff to manage an estate and receive the rents (*g*), even though a recompense may have been given him by the creator of the trust for his trouble (*h*). So a solicitor or an accountant may be employed where necessary (*i*), or an agent to collect debts at a reasonable commission (*k*). But he must be careful to appoint properly qualified persons, and if a solicitor or other such agent is employed to do things which the trustee ought strictly to have attended to himself, his charges will not be allowed (*l*).

Remuneration may be authorised by creator of the trust.

6. It is quite open for the creator of the trust to authorise a trustee to charge for services rendered, and in doing so either to fix the amount of compensation or to leave it open. The most ordinary case of such allowances being authorised is where a solicitor is appointed trustee, with power to charge for professional services rendered. If the amount of the sum or salary to be paid in consideration of such services is specified, no question can arise; if the compensation is not so fixed a reference will be directed to settle what is a proper allowance (*m*). It appears that such authorisation may arise from implication if clear (*n*). The position of a solicitor-trustee is considered in greater detail below (p. 159).

(*f*) *Balsh* v. *Higham*, *sup.*

(*g*) *Bonithon* v. *Hickmore*, 1 Vern. 316; *Stewart* v. *Hoare*, 2 Bro. C. C. 663.

(*h*) *Wilkinson* v. *W.*, *sup.*

(*i*) *Macnamara* v. *Jones*, 2 Dick. 587; *Henderson* v. *McIver*, 3 Madd. 275.

(*k*) *Hopkinson* v. *Roe*, 1 Beav. 180; *Weiss* v. *Dill*, 3 My. & K. 26.

(*l*) *Harbin* v. *Darby*, 28 Beav. 325; *Andrews* v. *Weall*, 42 Ch. D. 674; 58 L. J. Ch. 713.

(*m*) *Ellison* v. *Airey*, 1 Ves. jr. 115; *Willis* v. *Kibble*, 1 Beav. 559.

(*n*) *Douglas* v. *Archbutt*, 2 De G. & J. 148.

An annuity given to an executor for his trouble until a general settlement of the testator's affairs, was held not to cease on the institution of an administration suit (*o*); but where an annuity was given to a trustee as long as he should continue to execute the office of trustee, it was held that it ceased upon the termination of all active duties upon the payment of the whole of the trust fund to a person absolutely entitled (*p*). If such an annuity or other remuneration is authorised, and the trustee does not act, even though he be rendered incapable of so doing by the act of God, he is not entitled to receive it (*q*).

Or trustee may contract for remuneration with the *cestui que trust*.

7. A trustee may contract with his *cestui que trust* to receive some remuneration for acting or to make professional charges for so doing. But such a contract would be jealously watched by the Court, and would be set aside, unless it were perfectly fair, and obtained without any undue influence (*r*); and the contract must in distinct terms take the trustee out of the general rule (*s*).

Or with the Court.

8. A trustee may also contract with the Court that he will not undertake the trust without proper compensation; and if he undertake the trust upon the understanding that application should be made to the Court for compensation, a reference will be made to chambers to ascertain and settle what would be a reasonable allowance for his past and future services (*t*). In the case of an unusually difficult trust, the Court has sanctioned a commission being allowed to a trustee for his trouble (*u*). There is special statutory provision for the remuneration of judicial trustees (*x*).

Lapse of real estate.

9. Formerly, a trustee might sometimes, from accidental

(*o*) *Baker* v. *Martin*, 8 Sim. 25.
(*p*) *Hull* v. *Christian*, 17 Eq. 546.
(*q*) *Hanbury* v. *Spooner*, 5 Beav. 630; *Slaney* v. *Watney*, 2 Eq. 418.
(*r*) *Ayliffe* v. *Murray*, 2 Atk. 58.
(*s*) *Moore* v. *Frowd*, 3 My. & C. 45.
(*t*) *Marshall* v. *Holloway*, 2 Swanst. 432, 453; *Morrison* v. *M.*, 4 My. & C. 215.
(*u*) *Re Freeman's Trust*, 37 Ch. D. 148; 57 L. J. Ch. 160.
(*x*) 59 & 60 Vict. c. 35, s. 1.

circumstances, profit by his trust in a manner quite irrespective of any claim for remuneration or compensation. Where, for instance, a *cestui que trust* died intestate and without heirs, the trustee was entitled to the benefit of any realty vested in him as such, subject to the rights of creditors of the deceased *cestui que trust*. This accidental benefit accrued to him, however, not from the strength of any title of his own, but because no other person could show any title at all (*y*). The only person who could put in any claim would be the lord or the Crown, on the ground of escheat; and in that case it was decided that where the legal estate was already vested there was no escheat, or right to compel a conveyance from the trustee. *Burgess* v. *Wheate.*

The same principle was applied to copyholds in favour of a trustee as against the lord of the manor (*z*), and to a mortgage in fee where the mortgagor died intestate and without heirs (*a*).

But now, by the Intestates' Estates Act, 1884 (*b*), where a person dies without an heir and intestate as to any equitable estate or interest in any corporeal or incorporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest were a legal estate in corporeal hereditaments (*c*). Intestates' Estates Act, 1884.

The trustee of freeholds has, therefore, no longer the chance of profiting by a failure of heirs; and apparently the statute would take effect as to copyholds in favour of the lord of the manor.

In the case of personalty, if a *cestui que trust* dies intestate and without next of kin, the Crown by virtue of its prerogative can claim the chattels as *bona vacantia* (*d*). No advantages in case of personal estate.

(*y*) *Burgess* v. *Wheate*, 1 Eden, 177.
(*z*) *Gallard* v. *Hawkins*, 27 Ch. D. 298; 53 L. J. Ch. 834.
(*a*) *Beale* v. *Symonds*, 16 Beav. 406.
(*b*) 47 & 48 Vict. c. 71, s. 4.
(*c*) *Att.-Gen.* v. *Anderson*, (1896) 2 Ch. 596; 65 L. J. Ch. 814; and see *Moody* v. *Penfold*, (1891) 1 Ch. 258; 60 L. J. Ch. 143.
(*d*) *Powell* v. *Merrett*, 1 Sm. & G. 381; *Middleton* v. *Spicer*, 1 Bro. C. C. 201.

1 Will. IV. c. 40.

Before 1 Will. IV. c. 40, where a testator made no express disposition of the residue of his personalty, the executors were at law entitled thereto; nor did Courts of equity interfere with their enjoyment, unless it appeared to be the testator's intention to exclude them from interest therein. By that Act, however, as to wills made since the 1st Sept., 1830, executors are declared to be trustees of such undisposed-of residue for the next of kin under the Statute of Distributions, unless it should appear by the will that the executors were intended to take it beneficially. The onus of proving an intention in their favour is thus thrown upon them (*e*). An executor was, however, held entitled to take an undisposed-of residue beneficially, in a case in which there was parol evidence of such an intention in his favour (*f*).

iii. *To what persons the doctrine applies.*

Trustees and executors.

1. In *Robinson* v. *Pett* (*g*), under circumstances somewhat strongly in favour of allowing remuneration if possible, it was refused to one who was appointed to the office of trustee and executor, notwithstanding that he had renounced the executorship. Express trustees and executors are, therefore, seen to be most fully under the operation of the rule.

Of whatever occupation.

It matters not that the executor has been carrying on the business of a deceased partner (*h*), nor what his occupation or employment in life; for instance, neither a factor (*i*), nor a commission agent (*k*), nor an auctioneer (*l*), is allowed, without such authority as has been above mentioned, to make business or professional charges for work done in the execution of a trust which he has undertaken.

Solicitor trustee.

2. A solicitor who is appointed executor or trustee is

(*e*) *Harrison* v. *H.*, 2 H. & M. 237.
(*f*) *Camp* v. *Coe*, 31 Ch. D. 460.
(*g*) 3 P. Wms. 249.
(*h*) *Burden* v. *B.*, 1 V. & B. 170.
(*i*) *Scattergood* v. *Harrison*, Mos. 128.
(*k*) *Sherriff* v. *Axe*, 4 Russ. 33.
(*l*) *Kirkman* v. *Booth*, 11 Beav. 273.

within the rule (*m*), but this case requires special consideration.

Not only is such a solicitor personally disqualified from receiving remuneration, but it has been held that the firm to which he belongs is equally unable to charge the *cestui que trust* save for out of pocket costs and expenses (*m*), even though the business was actually attended to by a partner who was not a trustee (*n*).

There are, however, certain special limitations of the principle as applied to solicitors. Thus—

Exceptions. Business in an action.

(1.) Where *business is done in an action*, whether hostile or not, *or even in friendly proceedings*, such as an application for maintenance of an infant, a solicitor trustee or his firm may receive the usual charges, if acting for himself and his co-trustee; but no greater cost must be allowed than if the solicitor acted for the co-trustee alone (*o*).

Employment of partner.

(2.) An agreement between solicitors in partnership, that the one who is appointed trustee is not to participate in any of the profits or to derive any benefit from the business done for the trusts, has been considered sufficient to admit of his partner being employed as solicitor on usual terms (*p*).

Charges against third persons.

(3.) A solicitor trustee, who had invested the trust funds on mortgage, and, in doing so, acted for the mortgagor, was held entitled to retain professional charges paid by the mortgagor (*q*). But profit costs of preparing leases of the trust estate have been disallowed, although paid by the lessees (*r*).

Town agent's costs.

(4.) The costs of the town agent of a solicitor trustee are allowed (*s*).

(5.) Of course, if the testator or settlor creating the trust

(*m*) *Broughton* v. *B.*, 5 De G. M. & G. 160.

(*n*) *Christophers* v. *White*, 10 Beav. 523; *Lincoln* v. *Windsor*, 9 Ha. 158; *Burgess* v. *Vinicome*, 34 Ch. D. 77.

(*o*) *Cradock* v. *Piper*, 1 Mac. & G. 664; *Lawton* v. *Elwes*, 34 Ch. D. 675; 56 L. J. Ch. 294.

(*p*) *Clack* v. *Carlon*, 7 Jur. N. S. 441; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218; 63 L. J. Ch. 239.

(*q*) *Whitney* v. *Smith*, 4 Ch. 513.

(*r*) *Lawton* v. *Elwes*, *sup.*

(*s*) *Burge* v. *Brutton*, 2 Ha. 373.

appoints a solicitor trustee, and expressly authorises him to make the usual professional charges, he is entitled to do so (*t*). But his charges will be strictly limited to such as are well within the authorisation of the instrument creating the trust (*u*); and it will require special provisions to permit of charges for any services not strictly professional; services, for instance, such as an ordinary trustee ought to have done without the intervention of a solicitor. And if the estate is insolvent, he cannot claim his costs as against creditors, the right to claim profit costs being in effect a legacy (*x*). On the same principle he cannot claim them if he is an attesting witness of the will (*y*).

Mortgagees.

3. A mortgagee with power of sale stands in a fiduciary relation with regard to the mortgagor, and so will not be allowed, either alone or conjointly with his partner in any business, *e.g.*, as auctioneers, to derive any profit from the sale (*z*). In the case of a solicitor mortgagee, acting on behalf of the mortgagees, the cases were at one time very conflicting as to the solicitor's right to profit costs (*a*); but eventually the balance of authority was against it (*b*). But now, by the Mortgagees' Legal Costs Act, 1895 (*c*), a solicitor mortgagee is entitled to the same costs as if the mortgage had been made to a third person, and he had employed the solicitor to transact the business usually incident in such cases. The Act applies to mortgages made before it came into operation, but not where an order for taxation was made before the Act and such costs disallowed (*d*).

(*t*) *Ames* v. *Taylor*, 25 Ch. D. 72; *Harbin* v. *Darby*, 28 Beav. 325.

(*u*) *Newton* v. *Chapman*, 27 Ch. D. 584.

(*x*) *Pennell* v. *Franklin*, (1898) 1 Ch. 297; 2 Ch. 217; 67 L. J. Ch. 502.

(*y*) *Re Pooley*, 40 Ch. D. 1; 58 L. J. Ch. 1; *Re Barber*, 34 Ch. D. 665; 55 L. J. Ch. 373.

(*z*) *Matthison* v. *Clarke*, 3 Drew. 3.

(*a*) *Re Wallis*, 25 Q. B. D. 176; 59 L. J. Q. B. 500; *Re Roberts*, 43 Ch. D. 52; 59 L. J. Ch. 25; *Stone* v. *Lickorish*, (1891) 2 Ch. 363; 60 L. J. Ch. 289.

(*b*) *Fisher* v. *Doody*, (1893) 1 Ch. 129; 62 L. J. Ch. 14; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218; 63 L. J. Ch. 239.

(*c*) 58 & 59 Vict. c. 25, s. 3.

(*d*) *Day* v. *Kelland*, (1900) 2 Ch. 745; 70 L. J. Ch. 3; *Eyre* v. *Wynn-Mackenzie*, (1896) 1 Ch. 135; 65 L. J. Ch. 194.

Agents.

4. An agent entrusted with money or any other property for the purpose of using it for the owner's benefit, cannot make any profit by the use thereof. Instances of such disqualification being considered to attach to agency are seen in the cases of a vendor of public stamps (*e*), the master of a ship (*f*), and a part-owner of or partner in a ship acting as ship's husband (*g*).

Chairman and directors of companies.

5. A chairman or director of a company stands in a fiduciary relation towards the company, and will not as a rule be allowed to derive any profit beyond his salary from his office (*h*); and see also pp. 662 ff.

Constructive trustees not so strictly treated.

6. The principle does not apply in all its strictness to a person who is merely a constructive trustee. Though he must account for the profits of trust money employed, he will have an allowance made to him for his expenditure of time, skill, and trouble (*i*). Thus, a surviving partner is in a sense a trustee for the estate of the deceased partner, but the trust is limited to the performance of the obligation. Time runs in his favour (*k*), and if he continues the business, though he must account for the profits, he is entitled to a proper allowance for the trouble of management (*l*).

Surviving partner.

(*e*) *Att.-Gen.* v. *Edmunds*, 6 Eq. 381.

(*f*) *Shallcross* v. *Oldham*, 2 J. & H. 609.

(*g*) *Miller* v. *Mackay*, 31 Beav. 77; and see *Mayor, &c. of Salford* v. *Lever*, 25 Q. B. D. 363; 59 L. J. Q. B. 483.

(*h*) *Great Luxembourg Ry. Co.* v. *Magnay*, 25 Beav. 586; *Boston, &c. Co.* v. *Ansell*, 39 Ch. D. 339.

(*i*) *Brown* v. *Litton*, 1 P. Wms. 140.

(*k*) *Knox* v. *Gye*, L. R. 5 H. L. 656.

(*l*) *Featherstonehaugh* v. *Fenwick*, 17 Ves. 298; *Vyse* v. *Foster*, L. R. 7 H. L. 318, 329.

CHAPTER II.

FRAUD.

Distinction between Law and Equity.
Classification of Frauds.

I. *Actual Fraud.*
   1. *Arising from wrongful acts.*
   2. *Arising from wrongful omissions.*

II. *Transactions deemed on general grounds inequitable.*
   1. *Fraud presumed from the nature of the transaction.*
   2. *Fraud presumed from the circumstances or relation of the parties.*

III. *Frauds on public policy.*

IV. *Frauds on the private rights of third persons.*

THERE is no part of equitable jurisprudence more beneficial, and probably none of more ancient date, than its jurisdiction to give relief in circumstances of fraud. In the early days of the Court of Chancery it would seem that no cause more frequently induced suitors to seek its assistance than the fact that it granted relief in the case of many transactions which would not have been deemed fraudulent in the Courts of Common Law.

Fraud at law and in equity.

It has never been possible to draw a precise line between those cases in which common law would give complete relief and those in which it would be necessary to resort to

equity; and the provisions of the Judicature Act (*a*) already referred to have rendered such a distinction comparatively unimportant. Yet the difference of the two principles should be kept in mind here, as elsewhere, and it may be sketched in few words.

To constitute fraud at common law, it is not enough to show that fraud in the sense of misrepresentation and undue advantage of the position of the parties said to be imposed upon has been committed, but some act, so to speak, of offensive dishonesty must be brought home to the party charged with it.

In order to understand the attitude of equity in regard to fraud, reference must be made to the exposition of the general principles of equity at the beginning of the book. In dealing with fraud, equity may be observed to appeal to and act on the conscience of the parties, to demand not only a formal compliance with the rules of honesty, but a conscientious consideration (where such is owing) of the interests of other people. It will take into account all the circumstances of the case, not only the act and intention of the party complained of, but the position of the party said to have been imposed upon (*b*). It will interfere not only where actual *deception* has been practised, but also to prevent the dishonest circumvention of one person by another.

Definition of fraud.

It has by many writers been deemed undesirable, if not impossible, to formulate any definition which shall indicate the various forms in which fraud, as it is understood in Courts of equity, may present itself. The forms of fraud are infinite, and (in the words of Lord Hardwicke) were Courts of equity "once to lay down rules how far they "would go, and no farther, in extending their relief "against it, or to define strictly the species or evidence of "it, the jurisdiction would be cramped and perpetually

(*a*) 36 & 37 Vict. c. 66.
(*b*) *Stewart* v. *G. W. Ry. Co.*, 2 Dr. & Sm. 438.

"eluded by new schemes which the fertility of man's in-"vention would contrive" (*c*).

But though it is doubtless true that the evil which Lord Hardwicke feared might result from an authoritative definition, which purported to indicate the limits which would bind the Court in its interference with inequitable (or *iniquitous*) transactions, it is none the less useful, and it is by no means impossible, to arrive at a definite idea as to the meaning attached in Courts of equity to the term "fraud," and to express the same in clear and simple language. Of course, it will be observed in the first place that Courts of justice are only concerned with fraud in so far as it operates on legal rights. They have no concern with transactions which, however shocking to a moral sense, do not infringe such rights as are recognised by municipal law. Now it is a principle of equity that men should so far respect the legal rights of one another as to be fair and just in their dealings. And equity esteems it neither fair nor just that a man should deprive another of his rights by means of falsehoods respecting the matter in question. It is true that it cannot interfere in every case in which a transaction has been induced by false statements. It must assume men to be reasonably vigilant on the one hand, as it requires them to be fair and just on the other; and no general expression can indicate, or ought to indicate precisely, how far the Court will go in its interference with transactions induced by falsehood. Nevertheless, the first and most important element in what is known as "fraud" is falsehood or deception. But the term "fraud" covers other transactions in which there is not necessarily any falsehood, express or implied, neither *suggestio falsi* nor *suppressio veri*. A man may be tricked out of his rights without any deception operating on his mind and motives; as, for instance, where a man attempts

(*c*) Parke's Hist. of Chanc., p. 508; Story, 186; *Mortlock* v. *Buller*, 10 Ves. 292, 306.

to convey his property to another with intent to defeat the just claims of his creditors, or takes advantage of the necessity of another to make an unconscionable bargain with him. Such circumstances as these are often sufficient to move the Court to grant relief. And under one or other of these heads all dealings properly styled fraudulent may be classed. Fraud then may be taken to mean, the interference with legal rights either by deception or by circumvention (*d*).

This, however, though it serves as a statement of the juristic meaning of the term "fraud," goes but a very little way towards instructing the student as to the extent to which Courts of equity will go in granting relief against fraudulent dealings. This knowledge can only be reached by a consideration of the various classes of cases in which relief has been afforded.

Chesterfield v. *Janssen.* Lord Hardwicke's classification.

In the leading case of *Chesterfield* v. *Janssen* (*e*) Lord Hardwicke enumerated the different species of fraud which sufficed to induce the interference of equity to the following effect:—

1. Actual fraud or *dolus malus;* fraud arising from facts and circumstances of imposition.

2. Fraud apparent from the intrinsic nature and subject of the bargain itself; a class comprising inequitable and unconscientious bargains generally.

3. Fraud which may be presumed from the circumstances and condition of the parties to the transaction.

4. Fraud which is so considered from circumstances of imposition on other persons not parties to the transaction.

5. Fraud which is imputed in cases of catching bargains with heirs, reversioners, or expectants in the life of the fathers, &c.; a class of cases usually compounded of all or several of the other species of fraud, since in them there is generally either actual deception, weakness on one

(*d*) See the Law Quarterly Review, Oct. 1887, "Definition of Fraud," by M. M. Bigelow.

(*e*) 2 Ves. sr. 125; 1 W. & T. L. C. 592.

side and extortion on the other, or are unconscionable conditions and some deceit and illusion on other persons not privy to the agreement, such as the father or ancestor.

The last of these divisions is admittedly compounded of the others, and it will simplify the arrangement for our present purpose to treat the cases which would fall within it under the several headings to which they may be respectively referred. Moreover, the third class of frauds here specified seems rather to be a subdivision of the second than a distinct and correlative class. We shall, therefore, take as the second division inequitable and unconscientious transactions generally; of these, some being deemed fraudulent on account of their intrinsic nature or subject-matter; others on account of the peculiar circumstances or condition of the parties.

Again, the fourth class comprises two species of transactions so distinct as to warrant the consideration of each as correlative with the other main divisions. Some transactions are deemed fraudulent as being inconsistent with the general policy of the law; others from their tendency to unfairly compromise the private rights of individuals not parties thereto. These we shall consider separately.

Division of the subject.

We are accordingly left with four leading divisions, under one or other of which all the various transactions regarded in equity as fraudulent may be classed. It will be observed that this classification does not expressly recognise the distinction often taken between active and constructive fraud. The transactions classed under the latter head will, however, be found fully dealt with under one or the other of the last three divisions. By cases of constructive fraud are meant those in which equity, reviewing the conduct of one or more parties, practically says that if their conduct was not dishonest and fraudulent, (in familiar language) *it might just as well have been so;* that is to say, the suspicious conduct is so like actual fraud that for reasons of public policy it would be unsafe to attempt to draw a judicial distinction between them.

Constructive frauds.

The entire division of the subject will then be as follows:—

I. Actual fraud (*Dolus Malus*).
   1. Arising from wrongful acts.
   2. Arising from wrongful omissions.

II. Inequitable and unconscientious transactions.
   1. Fraud presumed from the character or subject-matter of the transactions.
   2. Fraud presumed from the circumstances or condition of the parties.
      (1.) Contracts with persons under duress, lunatics, imbeciles, infants, &c.
      Contracts between persons in fiduciary relations.
      (2.) Gifts between parties in unequal positions.

III. Frauds so considered on grounds of public policy.
   (1.) As to marriage.
   (2.) Restraint on trade.
   (3.) Sale of offices, &c.

IV. Frauds on the private rights of third persons.
   (1.) Fraudulent misrepresentations and concealments.
   (2.) Frauds on powers.

I. *Actual Fraud* (Dolus Malus), *exhibited in Facts and Circumstances of Imposition.*

Actual fraud is fraud evidenced by some positively dishonest act or omission. Under this head will be dealt with those cases in which an attempt to impose upon the aggrieved party by some wrongful act or omission is expressly proved. We shall distinguish frauds arising from wrongful acts from those arising from wrongful omissions.

Actual fraud. Imposition. Expressly proved.

1. Actual Fraud consisting in Wrongful Acts.

Suggestio falsi.

The largest class of transactions falling under this head is that in which the fraud consists in active misrepresentation, or *suggestio falsi*.

Rules in *Attwood* v. *Small*.

In the case of *Attwood* v. *Small* (*f*), Lord Brougham gave expression to three rules respecting the degree of misrepresentation which would justify the rescission of a contract in equity:—

1. The representation must have been contrary to fact.
2. The party making it must have known it to be contrary to fact.
3. It must have given rise to the contract (*dans locum contractui*).

Representation must be false.

The first of these rules needs but little comment, since it is but a bare definition of the most essential element of misrepresentation—its falsity. It is only necessary to point out the distinction between a misrepresentation as to a fact and a mere expression of opinion. A representation which amounts only to a statement of opinion, judgment, probability, or expectation, or is merely a conjectural or exaggerated statement, will generally be deemed immaterial, for a man is not justified in placing reliance on it (*g*). This includes language of puffing or commendation, commonly resorted to by vendors, on which purchasers are not presumed to place reliance (*h*). Sometimes, however, what is in form an expression of opinion is, under the circumstances, virtually equivalent to a statement of fact. Thus, where a vendor represented that property was let to "a most desirable tenant," well knowing that the rent was not regularly paid, there was held to be a misrepresentation sufficient to avoid the sale (*i*).

Expressions of opinion distinguished.

Reckless statements,

The second rule often gives rise to fine distinctions, and

(*f*) 6 Cl. & F. 232, 444.

(*g*) Kerr on Fraud, 39; *Haycraft* v. *Creasy*, 2 East, 92; *Jennings* v. *Broughton*, 5 De G. M. & G. 126, 134; *Bellairs* v. *Tucker*, 13 Q. B. D. 562.

(*h*) *Fenton* v. *Browne*, 14 Ves. 144.

(*i*) *Smith* v. *Land and House Property Corporation*, 28 Ch. D. 7.

to decisions which are not always easily reconciled. It is often proved that misrepresentations are made carelessly and without due inquiry, yet at the same time without a deliberate intention to deceive. In such cases the tendency of recent decisions has been to relax in some degree the stringency of some earlier cases. Such carelessness, though it may be evidence, is not necessarily proof, of fraud (*k*). To entitle a plaintiff to relief he must show that the statements relied on were made dishonestly (*l*); or in the alternative that there was under the circumstances a duty cast on the defendant to ascertain and state the truth (*m*). The special statutory provisions in the Companies Acts as to misrepresentations in a prospectus, and in company matters generally, will be more conveniently considered in the chapter on Company Law, *infra*, p. 647. Such misrepresentations may indeed, in certain circumstances, give a title to relief on the ground of mistake, as to which see *infra*, p. 213 *et seq.*

or negligent ignorance.

Thirdly, the misrepresentation must have given rise to the contract; or, in somewhat more general terms, misrepresentation in order to justify the rescission of a contract must be as to some material fact constituting an inducement or motive to the act or omission of the other party (*n*). This rule excludes cases in which the misrepresentation only extends to some unimportant detail, or to something merely collateral to the contract. And it follows from it, that misrepresentation is of no effect unless it has in fact misled the person complaining of it. If he knows it to be false it cannot have influenced his conduct (*o*). It does not indeed suffice for the defendant to

Must be *dans locum contractui*, *i.e.* of a material fact.

Must have in fact misled the party.

(*k*) *Derry* v. *Peek*, 14 App. Cas. 337; 58 L. J. Ch. 864; reversing 37 Ch. D. 541; *Angus* v. *Clifford*, (1891) 2 Ch. 449; 60 L. J. Ch. 443; and compare *Reese River, &c. Co.* v. *Smith*, L. R. 4 H. L. 64; *Owen* v. *Homan*, 4 H. L. 997, 1035.

(*l*) *Glasier* v. *Rolls*, 42 Ch. D. 436; 58 L. J. Ch. 820.

(*m*) *Rawlins* v. *Wickham*, 3 De G. & J. 304; *Burrowes* v. *Lock*, 10 Ves. 470; *Slim* v. *Croucher*, 1 De G. F. & J. 518, 525; *Low* v. *Bouverie*, (1891) 3 Ch. 82; 60 L. J. Ch. 594.

(*n*) Story, 195; *Pulsford* v. *Richards*, 17 Beav. 87, 96.

(*o*) *Nelson* v. *Stocker*, 4 De G. & J. 458.

say that the plaintiff had the means of knowledge within his reach, and that by inquiry he might have ascertained the truth; for "no man can complain that another has too "implicitly relied on the truth of what he has himself "stated" (*p*). If, however, having such means of knowledge, the plaintiff has used them, and having made inquiries he eventually acts on his own judgment, he cannot complain of the misrepresentation (*q*). And if a misrepresentation is capable of several interpretations, it is for the plaintiff to show on which he relied. The Court will not assume that he has been deceived merely because under the circumstances he very well might have been (*r*).

The injury must not be a remote consequence thereof.

Notwithstanding, again, that injury arises from misrepresentation, there will be no case for relief if the injury be but a remote consequence of the misrepresentation (*s*).

A misrepresentation by an agent may well suffice to avoid the contract of his principal (*t*). And so, if misrepresentations are made by the directors of a company, there is a remedy, not only against the directors personally, but also against the company, to the extent of any profits which have accrued to it through the fraud (*u*). Though, however, fraudulent directors are jointly and severally liable, so that one or more of them may be sued without the others (*x*), an innocent director is not liable for the fraud of his co-directors, if he is not chargeable with negligence in his duty (*y*).

Active concealment.

Another class of cases very similar to those considered

(*p*) *Redgrave* v. *Hurd*, 20 Ch. D. 1; 51 L. J. Ch. 113; *Reynell* v. *Sprye*, 1 De G. M. & G. 656, 710; *Central Railway Co., &c.* v. *Kisch*, L. R. 2 H. L. 99, 120; and see *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459.

(*q*) *Jennings* v. *Broughton*, 5 De G. M. & G. 126, 140; *Dyer* v. *Hargrave*, 10 Ves. 505.

(*r*) *Smith* v. *Chadwick*, 9 App. Cas. 187; 53 L. J. Ch. 873.

(*s*) *Barry* v. *Crosskey*, 2 J. & H. 1.

(*t*) *Mullens* v. *Miller*, 22 Ch. D. 194; 52 L. J. Ch. 380.

(*u*) *Western Bank of Scotland* v. *Addie*, L. R. 1 Sc. App. 145; *Lynde* v. *Anglo-Italian Hemp Co.*, (1896) 1 Ch. 178; 65 L. J. Ch. 96.

(*x*) *Parker* v. *Lewis*, 8 Ch. 1035.

(*y*) *Re Denham & Co.*, 25 Ch. D. 752; see also *Peek* v. *Gurney*, L. R. 6 H. L. 377.

under the head of misrepresentation is where the fraud consists in what has been called "active concealment"; as where a person uses some contrivance to hide a defect of something offered for sale. In every such contrivance there is fraud (*z*), provided, as in the case of misrepresentation, that the concealment has been of some material fact, and is *dans locum contractus*.

2. Actual fraud arising from wrongful omission.

Suppressio veri.

Under this head fall those cases in which fraud is imputed from the circumstance of a wrongful though passive concealment, or *suppressio veri*. In certain circumstances silence may be as fraudulent and fatal as falsehood.

The first and third of the rules applied to misrepresentation in *Attwood* v. *Small* (*a*), apply equally, *mutatis mutandis*, to passive concealment. It must relate to a material fact, and must be instrumental in bringing about the contract.

But there is this further restriction, that silence will not amount to fraud unless the fact suppressed is one which the party concealing it is under some legal or equitable obligation to disclose (*b*).

Fact suppressed must be one in which confidence is reposed.

If parties are dealing at arm's length, either may avail himself of his superior knowledge without being required to disclose it to the other; the vendor may have ascertained some defect, for instance, the unproductiveness of the land of a farm which he is selling; or the purchaser may have information of something which confers on the land exceptional value, such as a mineral deposit under it; but neither is required to communicate such knowledge (*c*). Such cases are very different from those already referred to, in which some actual artifice or contrivance is resorted to to conceal a defect.

(*z*) *Hill* v. *Gray*, 1 Stark. 434.

(*a*) *Sup.* p. 168.

(*b*) See *Coaks* v. *Boswell*, 11 App. Cas. 232; 55 L. J. Ch. 761; *Turner* v. *Green*, (1895) 2 Ch. 205; 64 L. J. Ch. 539.

(*c*) *Fox* v. *Mackreth*, 2 Bro. C. C. 420; *Turner* v. *Harvey*, Jac. 169, 178.

E.g. defects of title.

But if a vendor conceals a material fact as to which, from the nature of the case, confidence is reposed in him, the transaction may be set aside on the mere ground of his silence. Thus the concealment of an incumbrance on an estate (*d*), or of the death of a person on whom the title depends (*e*), or of other defects of title, will invalidate a transaction.

Patent and latent defects.

The distinction has been expressed as being between patent defects and latent defects. As to patent defects, or such defects as may be discovered by the exercise of ordinary vigilance, there is no duty to disclose them; each party may be reasonably required to rely on his own judgment. Latent defects, or such as one party has no means of discovering save through the other, must be disclosed.

Specially protected contracts.

These rules are generally applicable, but certain contracts are, from their nature, more narrowly protected from the consequences of concealment.

Insurance.

Thus in contracts of insurance (and in marine insurance especially), it is considered that since the insurer necessarily reposes confidence in the insured as to all facts and circumstances which are peculiarly within his own knowledge, not only misrepresentation, but concealment of a material fact which is not a matter of general knowledge, though it may be without fraudulent intention, vitiates the policy; that is, makes it voidable at the underwriter's election (*f*); and the obligation to make full disclosure extends not only to facts actually known to the assured, but to facts which he ought to and with proper diligence would have known (*g*). This doctrine applies to all contracts of insurance of whatever kind, *e.g.*, a contract

(*d*) *Edwards* v. *M'Leay*, 2 Swanst. 287.

(*e*) *Ellard* v. *Llandaff*, 1 Ba. & Be. 241; *Turner* v. *Green*, (1895) 2 Ch. 205; 64 L. J. Ch. 539.

(*f*) *Ionides* v. *Pender*, L. R. 9 Q. B. 531, 537; *Morrison* v. *Universal, &c. Co.*, L. R. 8 Ex. 197, 205.

(*g*) *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511; *Wheelton* v. *Hardisty*, 8 E. & B. 232; *Sillem* v. *Thornton*, 8 E. & B. 868. But see *Thomson* v. *Weems*, 9 App. Cas. 671.

guaranteeing the solvency of a person (*h*); but the concealment complained of must be such as is material to the risk undertaken (*i*).

In the contract of suretyship, also, the duty of making full disclosure is strictly insisted on (*k*). Suretyship.

On the same principle, in family settlements, in which parties may be expected to deal in a spirit of mutual trust and confidence, full communication must be made; and if it is not, though there may have been no fraudulent motive or intent, the transaction is liable to be set aside (*l*). Family settlements.

Where also a person makes a composition with his creditors he must deal openly and equally with them all. If by misrepresentation or concealment he creates a false impression as to the amount of his property, the transaction cannot be sustained (*m*). Neither is it lawful for the debtor to permit or for any creditor to obtain any secret or undue advantage. Equality between all the creditors is the very basis of composition deeds, and if there is any secret arrangement by which the concurrence of some or one of them is obtained by means of any exceptional concession, or if for any reason preference is shown, such arrangements are utterly void; they cannot be enforced even against the assenting debtor (*n*), and any money paid under them may be recovered back (*o*). Composition deeds.

It must be remembered that in all cases of actual fraud, the defrauded party may lose all right to relief by ratification of the fraudulent act; and this may be effected by continuing to deal with the person who has defrauded him, as well as by a formal release. But it is evident that Ratification.

(*h*) *Seaton* v. *Heath*, (1899) 1 Q. B. 782; 68 L. J. Q. B. 631.

(*i*) Same case on appeal, sub nomine *Seaton* v. *Burnand*, (1900) A. C. 135; 69 L. J. Q. B. 409.

(*k*) See *infra*, pp. 376 *et seq.*

(*l*) *Gordon* v. *G.*, 3 Swanst. 400, 473, 477; *Fane* v. *F.*, 20 Eq. 698; *Hoblyn* v. *H.*, 41 Ch. D. 200. See *infra*, p. 214.

(*m*) *Vine* v. *Mitchell*, 1 Mood. & R. 337; *Exp. Milner*, 15 Q. B. D. 605; 54 L. J. Q. B. 425.

(*n*) *Jackman* v. *Mitchell*, 13 Ves. 581.

(*o*) *Mare* v. *Sandford*, 1 Giff. 288; *McDermott* v. *Boyd*, (1894) 2 Ch. 428; *Ib.* 3 Ch. 365; 64 L. J. Ch. 13.

no acts, however formal, can amount to such a ratification unless the party does them after acquiring full knowledge of the fraud and its natural consequences (*p*). And if the Statute of Limitations is relied on in defence to an action based on fraud, the statute is deemed not to have begun to run until the fraud was discovered, or with reasonable diligence might have been so (*q*).

II. *Inequitable and Unconscientious Transactions.*

Sub-division.

This is necessarily a very wide and somewhat indeterminate class, which is scarcely susceptible of systematic analysis. We may, however, approach somewhat nearer to this than we should by a mere enumeration of cases, if we separate those transactions in which the chief ground for suspecting the fraud consists in the character or peculiar subject-matter of the bargain in question, from those in which the presumption of fraud arises more especially from the peculiar circumstances or relations of the parties concerned.

1. Where fraud is presumed from the nature of the transaction.

Catching bargains with heirs.

Complex character of these frauds.

Under this heading, one of the most important classes consists of transactions with expectant heirs and reversioners respecting their future interests. These dealings do, indeed, involve the consideration of fraud on third persons, namely, the parents or predecessors in title of the heirs or reversioners in question; and at the same time a frequent ingredient in the fraud imputed is the suspicion of duress

(*p*) *Vigers* v. *Pike*, 8 Cl. & F. 562, 630; *Jacques-Cartier* v. *La Banque D'Epargne, &c.*, 13 App. Cas. 111.

(*q*) *Gibbs* v. *Guild*, 9 Q. B. D. 59; 51 L. J. Q. B. 313; *Betjemann* v. *B.*, (1895) 2 Ch. 474; 64 L. J. Ch. 641; *Willis* v. *Earl Howe*, (1893) 2 Ch. 545; 62 L. J. Ch. 690.

arising from the distress of the vendor, and the consequent unequal position of the parties. For these reasons Lord Hardwicke, as we have seen (*r*), included these bargains in a separate class compounded of the others. Nevertheless, for simplicity's sake, we have preferred rather to treat of them here, in consideration that the leading element of fraud in them is the suspicion attaching to the very nature of the bargains themselves.

Effect of inadequacy of consideration.

In these cases the question is usually raised as to the effect of inadequacy of price. Now it is well established that in dealings with interests in possession mere inadequacy of price is not, generally speaking, of itself a sufficient ground for setting aside a purchase (*s*). The inadequacy may, indeed, be so gross as to amount to clear evidence of actual fraud, but to this end it must be "so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it" (*t*).

Harrison v. *Guest*.

A striking illustration of this is supplied by the case of *Harrison* v. *Guest* (*u*), where an illiterate bedridden old man 71 years of age conveyed away without professional advice property of the value of £400 for the consideration of board and lodging during his life. He lived only six weeks afterwards; yet the inadequacy of consideration was not deemed sufficient to warrant the disturbance of the transaction.

Secus as to reversions before 31 Vict. c. 4.

But of dealings with reversions and expectancies equity is much more suspicious. Previously to the statute presently to be mentioned, fraud was in these cases commonly presumed from inadequacy of consideration (*v*); and such transactions were frequently set aside on this ground only, without proof of any other ingredients of fraud, such as

(*r*) p. 165.

(*s*) *Gwynne* v. *Heaton*, 1 Bro. C. C. 1, 8; *Tennent* v. *T.*, L. R. 2 H. L. (Sc.) 6.

(*t*) *Gwynne* v. *Heaton*, *sup.*

(*u*) 6 De G. M. & G. 424; cf. *Rees* v. *De Bernardy*, (1896) 2 Ch. 437; 65 L. J. Ch. 656.

(*v*) *Peacock* v. *Evans*, 16 Ves. 512.

misrepresentation, undue influence, &c. (*x*). And the fact that the expectant was of a mature age, or well understood the nature and extent of the transaction, was immaterial (*y*). From the fact of a person selling such an interest, the Court presumed that he was under pecuniary pressure; and it was not incumbent on him to prove that it was so. The *onus* was on the purchaser to show that the transaction was just and reasonable (*z*).

Under 31 Vict. c. 4

By the Sales of Reversions Act (*a*), however, it is enacted that "no purchase made *bonâ fide, and without fraud or un-* "*fair dealing*, of any reversionary interest in real or per- " sonal estate, shall hereafter be opened or set aside merely " on ground of undervalue." This Act came into operation on the 1st of January, 1868; but a series of decisions has clearly shown that it has not affected the jurisdiction of equity in cases of unconscientious purchases of reversions (*b*). In *Tyler* v. *Yates* (*c*) Lord Hatherley said: " The legislature has not repealed the doctrines of this " Court by which protection is thrown around unwary " young men in the hands of unscrupulous persons ready " to take advantage of their necessities. I conceive the " reason why the law as to sales of reversions was altered " to be that the doctrines of this Court had been carried to " an extravagant length on that subject" (*d*).

The effect of the statute seems to be that in future the inadequacy of consideration must be so gross as to amount to evidence of fraud; but it has been held that the burden of proof is still on the purchaser (*e*), the circumstances of the case still rendering the Court more suspicious respect-

(*x*) *Curwyn* v. *Miller*, 3 P. Wms. 293 n.; *Aylesford* v. *Morris*, 8 Ch. 484; *Freeman* v. *Bishop*, Barn. Ch. R. 15; 2 Atk. 39.

(*y*) *Portmore* v. *Taylor*, 4 Sim. 182; *Bromley* v. *Smith*, 26 Beav. 644.

(*z*) *Gowland* v. *De Faria*, 17 Ves. 20; *Lord* v. *Jeffkins*, 35 Beav. 79.

(*a*) 31 Vict. c. 4.

(*b*) *Miller* v. *Cook*, 10 Eq. 641.

(*c*) 11 Eq. 265; 6 Ch. 665.

(*d*) See also *Aylesford* v. *Morris*, *sup.*; *Fry* v. *Lane*, 40 Ch. D. 312; 58 L. J. Ch. 113.

(*e*) *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814.

ing such bargains than in case of a sale of an interest in possession.

The Court has applied the same principle to relieve against a grossly usurious loan to a young man without means, where the expectation of the usurer was to obtain payment by extortion from the father or some relation of the defrauded person (*f*).

Neither before nor since the statute has there been or is there any precise rule as to what difference between the real value and the price paid constitutes inadequacy. In Roman law it was considered that anything above half the value was a sufficient price to sustain the transaction; but in English equity it is a question of which the Court decides on the facts of each case (*g*).

Reversions, how valued.

In ascertaining the value of a reversion, the Court is guided by the evidence as to the market price at the time of the transaction, rather than by the calculations of actuaries (*h*). The question is not affected by facts subsequent to the contract. Whether the reversion falls in unexpectedly soon or is unexpectedly long delayed, though of course greatly affecting its actual value in the result, is not material to the inquiry as to what was an adequate value according to everybody's knowledge at the time (*i*).

Sale of reversion by auction.

Where a sale of a reversionary interest takes place by public auction, the nature of the case supplies strong evidence that the market price has been paid (*k*). But care will be taken to ascertain that the auction has been fairly conducted. Thus if the purchaser knows that the vendor is selling under pressure, and without the usual precautions against a sacrifice of the property, it will still be incumbent on him to prove that the price given was a fair one (*l*).

Post obits.

Post obit bonds, or bonds conditioned for payment of a

(*f*) *Nevill* v. *Snelling*, 15 Ch. D. 679.

(*g*) *Baldwin* v. *Rochford*, 2 Ves. sr. 517, cited; *Nott* v. *Hill*, 2 Ch. Ca. 121.

(*h*) *Potts* v. *Curtis*, You. 543; *Wardle* v. *Carter*, 7 Sim. 490.

(*i*) *Gowland* v. *De Faria*, *sup.*

(*k*) *Shelly* v. *Nash*, 3 Madd. 232.

(*l*) *Fox* v. *Wright*, 6 Madd. 111.

sum of money on the death of a person from whom the obligor has expectations, are on similar principles regarded with suspicion in equity, and if of an unconscionable character will be suffered only to stand as security for the actual sum lent thereon, with proper interest (*m*). And the same applies to other securities of a kindred nature.

Fraudulent pretence of trading.

The ingenuity of money-lenders has often led them to disguise usurious loans to expectant heirs under the mask of trading, goods being supplied merely for the purpose of being at once re-sold. Such transactions are, however, within the reach of Courts of equity, and will be set aside upon payment of what the goods actually produced upon a re-sale, with interest (*n*).

King v. *Hamlet*.

A leading case in dealings of this kind is *King* v. *Hamlet* (*o*), where Lord Brougham stated that relief in these cases should be refused if either the father or other person standing *in loco parentis* to the defrauded person was aware of and did not oppose the transaction, or if the person himself so acted upon the bargain as to alter the situation of the other party or of his property, after the pressure which induced it had ceased. But these rules have been questioned by Lord St. Leonards (*p*); and it seems that the acquiescence of a father will have no more effect than to lead more or less strongly, according to the facts of the case, to the inference that a bargain so authorised was fair and innocent (*q*). The repeal of the usury laws does not affect the jurisdiction of the Court in these cases (*r*). By the Money Lenders Act, 1900 (*s*), statutory provision is made for re-opening transactions between borrowers and money-lenders (as defined by the Act)

(*m*) *Curling* v. *Townsend*, 19 Ves. 628; *Benyon* v. *Fitch*, 35 Beav. 570.

(*n*) *Waller* v. *Dalt*, 1 Ch. Ca. 276; 1 Dick. 8; *Barker* v. *Vansommer*, 1 Bro. C. C. 149.

(*o*) 2 My. & K. 456; 3 Cl. & F. 218.

(*p*) Sugd. V. & P. p. 316, 11th ed.

(*q*) *Talbot* v. *Stainforth*, 1 J. & H. 484, 502. See *Rae* v. *Joyce*, 29 L. R. Ir. 500.

(*r*) *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814; *Aylesford* v. *Morris*, 8 Ch. 484.

(*s*) 63 & 64 Vict. c. 51.

which are harsh or unconscionable, or where excessive interest is charged; and special provisions are made to guard against oppressive bargains.

Terms of relief.

In all such cases as we have been considering equity proceeds on the maxim that "*He who seeks equity must do equity*," and only grants relief on the terms of the plaintiff paying the sum actually advanced with interest and any sums reasonably expended by the defendant in improvements, and of proper costs (*t*). Only simple interest at 5 per cent. is allowed (*u*), and a defendant will disentitle himself to costs by any improper conduct, such as refusal to accept a full sum in discharge before action brought (*v*).

Confirmation and acquiescence.

Transactions originally impeachable may, moreover, be rendered valid by subsequent confirmation or acquiescence (*x*). But such confirmation or acquiescence is only effectual when it has taken place after a complete cessation of the original pressure (*y*), and with a full cognizance of the right to relief (*z*). And a transaction which is not merely voidable, but absolutely void, as were usurious contracts before 17 & 18 Vict. c. 90, and as are marriage brokage contracts still, cannot be set up by any subsequent confirmation.

Family arrangements excepted.

Family arrangements do not come within the restrictions respecting dealings with reversionary interests, unless, of course, induced by undue influence of a parent over a child (*a*); nor do settlements made in consideration of natural affection (*b*).

2. Fraud presumed from the position of the parties.

Fraud presumed from

The second and larger class of inequitable and uncon-

(*t*) *Murray* v. *Palmer*, 2 S. & L. 474, 490; *Salter* v. *Bradshaw*, 26 Beav. 161, 165.

(*u*) *Gowland* v. *De Faria*, 17 Ves. 20; *Miller* v. *Cook*, 10 Eq. 647.

(*v*) *Benyon* v. *Fitch*, 35 Beav. 570, 578.

(*x*) *Cole* v. *Gibbons*, 3 P. Wms. 289; *Sibbering* v. *Balcarras*, 3 De G. & Sm. 735.

(*y*) *Gowland* v. *De Faria*, *sup.*

(*z*) *Savery* v. *King*, 5 H. L. 627; *Mitchell* v. *Homfray*, 8 Q. B. D. 587; 50 L. J. Q. B. 460.

(*a*) *Tweddell* v. *T.*, T. & R. 1, 13; *inf.* p. 185.

(*b*) *Shafto* v. *Adams*, 4 Giff. 492.

the position of the parties.

scientious transactions comprises those in which the chief, or it may be the sole element of fraud, consists in the peculiar circumstances or relations of the parties concerned.

Contracts and gifts.

Under this head we have to deal with two very distinct classes of transactions, namely, contracts and donations or gifts, which, though to some extent subject to the same principles, are sufficiently contrasted to require separate consideration. And, first, of contracts.

(1.) *Contracts.*

Contract requires consent and freedom.

The very foundation of contract is consent or agreement. There can be no true consent or agreement without a capacity to understand the terms of the agreement, and also freedom to accept or to refuse the terms proposed.

If, then, a person induces another who lacks either this capacity or this freedom, to enter into an apparent contract, however it may be fenced by formal observances, equity will not recognise the transaction; but, deeming it fraudulent, will generally grant relief against it at the suit of the party imposed upon.

Contracts with lunatics and idiots;

i. Thus from their want of a capacity to understand proposals submitted to them, the contracts of idiots and lunatics, and other persons *non compotes mentis*, are generally deemed invalid in Courts of equity. In order to sustain a contract entered into with a lunatic, the person supporting it must be prepared to show the most perfect good faith, and that it was for the benefit of the lunatic. Equity will not interfere where the contract was entered into without knowledge of the incapacity and it is evident that no advantage has been taken of the weaker party (*c*); and it will follow the law in sustaining contracts for providing the lunatic with necessaries (*d*). It may be that applying the strict test of jurisprudence such contracts would be equally void with others in which there has been

(*c*) *Manby* v. *Bewicke*, 3 K. & J. 342.
(*d*) *Nelson* v. *Duncombe*, 9 Beav. 211.

palpable imposition; but the practical contrast is sufficiently apparent.

with infirm persons;

ii. Equity will, moreover, often interfere where the person imposed upon has not suffered from such aberration of mind as amounts to insanity, but has nevertheless, from old age or other infirmity, been so deficient in wit as to be an easy subject of imposition and undue solicitation or influence. The burden of proving fairness of dealing with such people is on him who ventures on it, and if he fails the transaction will be set aside, and any advantage made thereout must be disgorged (*e*).

with drunken persons;

iii. Drunkenness will in some cases invalidate a contract entered into during its influence. If, in the first place, a person has designedly contrived to draw another into intoxication for the purpose of imposing upon him while in that state, equity will interfere to prevent the enjoyment of the advantage thus fraudulently conceived. But in the absence of any such premeditated designs, equity will only interfere in cases where the drunkenness of one of the parties has been so excessive as to practically deprive him of all reason and understanding. In cases of slighter intoxication it will refuse to interfere either to enforce or to rescind the contract, being equally unwilling to assist the one person who has immorally incapacitated himself, and the other who has immorally taken advantage of the incapacity (*f*). At law it has been held that a contract made under excessive drunkenness is voidable but not void, and is therefore capable of ratification by the person when sober (*g*).

with persons under duress.

iv. In the cases above referred to the absence of the capacity to understand the proposal was the chief ground of interference. The absence of freedom to accept or

(*e*) *Longmate* v. *Ledger*, 2 Giff. 157, 164; *Fry* v. *Lane*, 40 Ch. D. 312; 58 L. J. Ch. 113; *Rees* v. *De Bernardy*, (1896) 2 Ch. 437; 65 L. J. Ch. 656.

(*f*) See *Cooke* v. *Clayworth*, 18 Ves. 12; *Johnson* v. *Medlicott*, 3 P. Wms. 130, cited note *a*.

(*g*) *Matthews* v. *Baxter*, L. R. 8 Ex. 132.

reject the proposal is of like effect. The general test of what amounts to such duress or undue influence as to invalidate a contract is the question whether the party was or was not a free agent. Though there may not be actual compulsion or duress, if a person is under the influence of extreme terror, or of extreme necessity, and any advantage is taken of his position, equity will grant him relief (*h*). *A fortiori*, if the person is actually under imprisonment at the time, any dealings with him will be narrowly scrutinised in his favour (*i*).

Infants.

v. There is no necessity for discussing at length the contracts of infants in a work especially devoted to the exposition of the distinctive doctrines of equity, the law respecting them being now regulated by the Infants' Relief Act, 1874 (*k*), which enacts that thenceforth all contracts "entered into by infants for the repayment of "money lent or to be lent, or for goods supplied or to be "supplied (other than contracts for necessaries) (*l*), and all "accounts stated with infants shall be absolutely void; "provided always that this enactment shall not invalidate "any contract into which an infant may, by any existing "or future statute, or by the rules of common law or equity "enter, except such as now by law are voidable" (*m*). "No action shall be brought whereby to charge any "person upon any promise made after full age to pay any "debt contracted during infancy, or upon any ratification "made after full age of any promise or contract made "during infancy, whether there shall or shall not be any "new consideration for such promise or ratification after "full age" (*n*). Moreover, it is now a criminal offence to

(*h*) *Evans* v. *Llewellyn*, 1 Cox, 333, 340; *Hawes* v. *Wyatt*, 3 Bro. C. C. 156, 158; *Boyse* v. *Rossborough*, 6 H. L. 2, 49; *James* v. *Kerr*, 40 Ch. D. 449; 58 L. J. Ch. 355.

(*i*) *Roy* v. *Beaufort*, 2 Atk. 190.

(*k*) 37 & 38 Vict. c. 62.

(*l*) The consideration of what contracts fall within the description of "necessaries" pertains rather to common law than equity.

(*m*) S. 1; *Exp. Beauchamp*, (1894) 1 Q. B. 1; A. C. 607; 63 L. J. Q. B. 302.

(*n*) S. 2; but see *Northcote* v. *Doughty*, 4 C. P. D. 385; *Ditcham* v. *Worrall*, 5 *ib.* 410; *Smith* v. *King*, (1892) 2 Q. B. 543.

incite an infant to betting, wagering or the borrowing of money (*o*). Questions arising in respect of the marriage settlements of infants are considered at a later page (*p*).

Where, however, an infant induces persons to deal with him by falsely representing himself as of full age, he is bound in equity by payments made and acts done at his request and on the faith of such representations, and is liable to restore any advantage he has obtained by such representations to the person from whom he has obtained it (*q*). The principle is that an infant shall not take advantage of his own fraud (*r*). But in order to its application, there must have been an actual false representation, not mere dissimulation; and the party must have been in fact deceived (*s*). Money paid by an infant under a void contract has been held not to be recoverable by him when he has actually enjoyed the benefit of the contract, and the parties cannot be restored to their original position (*t*). But it is otherwise if no benefit has been enjoyed (*u*).

Common sailors.

vi. A unique exception from the ordinary rules applicable to contracts is made in favour of common sailors. In consideration of their characteristic carelessness and improvidence, equity carefully scrutinises any contracts made with them respecting wages or prize money due to them, and often grants relief when it appears that undue advantage has been taken of them (*x*).

Hitherto the contracts we have been considering have come under review in connexion with the subject of fraud, on account of some absolute incapacity total or partial in one of the parties; that is to say, an incapacity not due to the existence of any particular relation between the con-

(*o*) 55 Vict. c. 4.

(*p*) *Inf.* p. 456.

(*q*) Pollock Contr. 74, 6th ed.

(*r*) *Overton* v. *Banister*, 3 Ha. 503; *Clarke* v. *Cobley*, 2 Cox, 173.

(*s*) *Nelson* v. *Stocker*, 4 De G. & J. 458; *Lemprière* v. *Lange*, 12 Ch. D. 675; *Exp. Jones*, 18 Ch. D. 109.

(*t*) *Valentine* v. *Canali*, 24 Q.B.D. 166; 59 L. J. Q. B. 74.

(*u*) *Hamilton* v. *Vaughan, &c. Co.*, (1894) 3 Ch. 589; 63 L. J. Ch. 795.

(*x*) *How* v. *Wheldon*, 2 Ves. sr. 516.

tracting parties. The fraud imputed in these cases has usually been deemed a species of actual fraud (*y*).

Contracts with persons under fiduciary relations.

vii. But there is another large class of contracts usually esteemed to come under the head of constructive fraud, in which the incapacity which raises the suspicion of fraud is wholly due to a special relation between the parties, such as that of trustee and *cestui que trust*, or solicitor and client. These cases we have fully considered under the head of constructive trusts. All that was there said might with equal appropriateness have been inserted here.

Constructive trusts.

It is a good illustration of the interdependence of the various branches of equitable jurisprudence that such a complete class should fall so aptly under two distinct headings. Because of its jurisdiction in, and its jealous scrutiny of all matters tainted with fraud, equity has created, for the purpose of securing even justice, an extensive class of trusts. Or, viewing the same question from the other side, we may say that in devising a remedy for cases of fraud equity has utilised the principle of trusts, which was originally designed for very different purposes.

(2.) *Gifts.*

Voluntary gifts.

Our next consideration is that of voluntary gifts or donations which are deemed fraudulent through the presumption of undue influence which is raised by the relations between the donor and donee.

These, again, might well have been dealt with under the heading of constructive trusts, the principles illustrated by the case of *Fox* v. *Mackreth* (*z*) being precisely analogous to those which now present themselves. Notwithstanding this, we have preferred to consider these cases under the head of fraud. The very separation of things so similar will perhaps serve a good purpose in emphasizing the relation of the various branches of the subject to each other; while any confusion of arrangement

(*y*) Story, 228—243. (*z*) *Sup.*, p. 99.

will be completely avoided by a careful attention to this explanation, and to the reference made under each head to the other.

The first subject of inquiry respecting voluntary donations induced by fraud is as to what relationship between the parties will raise a presumption of undue influence. What relation raises the presumption.

One of the most frequently cited cases on this subject is *Huguenin* v. *Baseley* (*a*). Here there was a voluntary settlement by a widow upon the defendant, who was a clergyman, and who had been appointed by her as her agent to manage her affairs. On her subsequently marrying, a bill was filed on behalf of herself and her husband praying that the settlement might be set aside, and this relief was granted on the ground that the defendant had exercised undue influence, and abused the confidence reposed in him. *Huguenin* v. *Baseley*.

The first question is, what relationship between a donor and donee is within the principle of this case.

i. Parent and child.

Donations from a child to a parent have always been jealously regarded in equity, and of course especially so when they take place but a short time after the attainment of majority. They will be set aside if it appears that any advantage has been taken of the parental authority (*b*); but the mere fact of the relationship will not be sufficient ground for interference when the transaction appears to be reasonable and *bonâ fide* (*c*); and *à fortiori* if it is of the nature or a family arrangement, as to which see p. 214. If there has been undue influence, a volunteer, or a pur- Parent and child.

(*a*) 14 Ves. 273; 2 W. & T. L. C. 547.

(*b*) *Cocking* v. *Pratt*, 1 Ves. sr. 400; *Wright* v. *Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133; *Turner* v. *Collins*, 7 Ch. 329.

(*c*) *Blackborn* v. *Edgeley*, 1 P. Wms. 600, 606; *Tendril* v. *Smith*, 2 Atk. 86; *Powell* v. *P.*, (1900) 1 Ch. 243; 69 L. J. Ch. 164.

chaser with notice claiming through the father, is in no better position than the father himself (*d*).

Person *in loco parentis*.

In this, as in many other cases, a person standing *in loco parentis* is within the same rule as a parent (*e*). The meaning of the expression *in loco parentis* is sufficiently explained elsewhere (*f*).

ii. Guardian and ward.

Guardian and ward.

A gift from a ward to a guardian is always suspected; and if made immediately on the ward's attaining his majority, it is liable to be set aside upon the presumption of undue influence (*g*). Even when a considerable time has elapsed before the gift, if undue influence can be proved, the same relief will be given (*h*). A guardian is not suffered to set up his trouble in the execution of the guardianship as a consideration for such a gift (*h*). The case against the guardian is strengthened if his accounts have not been closed, and the donation takes place while he still retains the ward's property in his hands (*i*).

But where the authority and influence of the guardian have ceased, equity will not set aside a reasonable gift made to him (*k*).

Following the analogy of the rule which considers persons *in loco parentis* as under the same restrictions as parents, the principle applies as well to a person who has assumed the office and functions of a guardian as to a guardian legally appointed (*l*). But in the absence of any such special relationship, the fact of infancy (it must be remembered) does not invalidate a gift (*m*).

(*d*) *Bainbrigge* v. *Browne*, 18 Ch. D. 188.
(*e*) *Archer* v. *Hudson*, 7 Beav. 551; *Kempson* v. *Ashbee*, 10 Ch. 15.
(*f*) Pp. 80, 512.
(*g*) *Everitt* v. *E.*, 10 Eq. 405.
(*h*) *Hylton* v. *H.*, 2 Ves. sr. 547, 549.
(*i*) *Pierse* v. *Waring*, 1 P. Wms. 121, n.; 2 Ves. sr. 549, cited.
(*k*) *Hatch* v. *H.*, 9 Ves. 296.
(*l*) *Griffin* v. *De Veulle*, 1 P. Wms. 131, n.; 14 Ves. sr. 279, cited.
(*m*) *Taylor* v. *Johnston*, 19 Ch. D. 603; 51 L. J. Ch. 879.

iii. Trustee and cestui que trust.

Trustee and *cestui que trust.*

The relationship of trustee and *cestui que trust* is within the same doctrine as fully with respect to donations as we have seen that it is with respect to contracts (*n*), and a mortgagee being a trustee for his mortgagor is included (*n*).

iv. Legal adviser and client.

Legal adviser and client.

A solicitor has always been disabled in equity from taking any gifts from his client, pending a suit, or at any time while the relationship subsists, beyond his proper remuneration (*o*); and a counsel has been held to be within the same rule (*p*). In a case in which a client acted without independent advice, a gift to a solicitor's wife was declared void as being within the rule (*q*). Any agreement by which a client undertakes to pay his solicitor a gross sum for past services is closely scrutinised, and will not be held binding unless made in writing (*r*). Such contracts in respect of future business are now authorised by 33 & 34 Vict. c. 28, and 44 & 45 Vict. c. 44; subject nevertheless to taxation (*s*).

v. Medical adviser and patient.

Doctor and patient.

The relation between a doctor and his patient has been considered sufficient to support a claim for relief against a voluntary gift, on the ground of undue influence (*t*).

vi. Religious advisers.

Priest and penitent.

The above-cited case of *Huguenin* v. *Baseley* (*u*) is

(*n*) Pp. 99—110; *Barrett* v. *Hartley*, 2 Eq. 789.

(*o*) *Tompson* v. *Judge*, 3 Drew. 306; *James* v. *Kerr*, 40 Ch. D. 449; 58 L. J. Ch. 355; *Willis* v. *Barron*, (1902) A. C. 271.

(*p*) *Broun* v. *Kennedy*, 33 Beav. 133; 4 De G. J. & S. 217.

(*q*) *Liles* v. *Terry*, (1895) 2 Q. B. 679; 65 L. J. Q. B. 34.

(*r*) *Re Russell*, 30 Ch. D. 114.

(*s*) See *Re Palmer*, 45 Ch. D. 291; 59 L. J. Ch. 575; *Re Frape*, (1893) 2 Ch. 284; 62 L. J. Ch. 473.

(*t*) *Dent* v. *Bennett*, 4 My. & Cr. 269.

(*u*) *Sup.* p. 185. And see *Allcard* v. *Skinner*, 36 Ch. D. 145; 56 L. J. Ch. 1052; *Nottidge* v. *Prince*, 2 Giff. 246; *Morley* v. *Loughnan*, (1893) 1 Ch. 736; 62 L. J. Ch. 515.

sufficient authority to show that a clergyman or other religious adviser is within the principle under consideration.

vii. **Other relations of confidence.**

Fiduciary relations generally.

The jurisdiction of equity in respect of donations under undue influence is by no means confined to cases in which there is some certain and definite relationship such as we have been considering. Any circumstances which give one person the power of exercising pressure on another may suffice to substantiate a claim for equitable relief. In fact, just as the Court has refused to define fraud itself, so it has refused to commit itself to an enumeration or description of the persons within the doctrine now in question (*x*).

Thus the principle has been applied as between husband and wife (*y*). A gift from an engaged lady to her suitor is liable to be carefully scrutinised, and to sustain it the gentleman must be prepared to show that it was made without undue solicitation or pressure (*z*). A professor of spiritualism has also been considered to stand in a position of undue authority with respect to a believer in his art, and a gift made to him has been set aside (*a*). The same rule has been applied in the case of a person claiming the benefit of a settlement from his deceased wife's sister on his going through the form of marriage with her (*b*).

What is undue influence?

The next question is, what generally amounts to undue influence; and this, again, is a matter in which no formal definition can be drawn. It is decided by the Court in its discretion on the circumstances of each particular case.

Circumstances

But there are certain circumstances frequently found in

(*x*) *Dent* v. *Bennett*, 4 My. & Cr. 269.

(*y*) *Turnbull* v. *Davis*, (1902) A. C. 429; *Willis* v. *Barron*, (1902) A. C. 271; affirming S. C., (1900) 2 Ch. 101; 69 L. J. Ch. 532; but see *Nedby* v. *N.*, 5 De G. & S. 377.

(*z*) *Page* v. *Horne*, 11 Beav. 227; *Corbett* v. *Brock*, 20 Beav. 524.

(*a*) *Lyon* v. *Home*, 6 Eq. 655.

(*b*) *Coulson* v. *Allison*, 2 De G. F. & J. 521.

cases of this class which weigh heavily with the Court in the exercise of this discretion, and serve to illustrate the mode of reasoning on which relief is granted. favouring the presumption.

Thus the absence of any disinterested or professional advice on the side of the plaintiff, especially where there is a confidential relation between the parties, or considerable disparity between their powers of judgment and means of knowledge, gives rise to a strong suspicion of fraud (*c*). So also a fictitious statement of consideration is a material indication of an undue advantage having been taken (*d*). The absence of a power of revocation in a voluntary settlement (*e*), and even the mere improvidence of the transaction (*f*), are of influence in the same direction. But such circumstances as these will not, in the absence of some such relation of confidence as those above enumerated, always dispense with the necessity of the plaintiff's explicitly proving the fact of undue influence (*g*). It at least requires a strong case where no such relation exists to throw upon the donee the burden of proving the innocence of the transaction (*h*). Absence of independent advice; false statement of consideration; absence of power of revocation; improvidence.

A gift as well as a contract made under circumstances of duress, such as threats of prosecution or other forms of intimidation, will clearly be set aside (*i*). Duress.

As a rule, where a gift is tainted with fraud, the transaction cannot be sustained on behalf of a third person claiming through the donee any more than by the donee himself (*k*). But it is otherwise in the case of a *bonâ fide* purchase from the donee without notice of the fraud. A person so acquiring the property having an equal equity Fraud prevails against volunteer claiming through the donee.

(*c*) *Rhodes* v. *Bate*, 1 Ch. 252; *Dent* v. *Bennett*, 4 My. & Cr. 269, 273.

(*d*) *Hawes* v. *Wyatt*, 3 Bro. C. C. 156; *Sharp* v. *Leach*, 31 Beav. 491.

(*e*) *Coutts* v. *Ackworth*, 8 Eq. 558; *Powell* v. *P.*, (1900) 1 Ch. 243; 69 L. J. Ch. 164; but see *Henry* v. *Armstrong*, 18 Ch. D. 668.

(*f*) *Harvey* v. *Mount*, 8 Beav. 439.

(*g*) *Hunter* v. *Atkins*, 3 My. & K. 113; *Toker* v. *T.*, 31 Beav. 629.

(*h*) *Beanland* v. *Bradley*, 2 Sm. & G. 339; *Hoghton* v. *H.*, 15 Beav. 278, 299; *Hall* v. *H.*, 8 Ch. 430.

(*i*) *Evans* v. *Llewellyn*, 1 Cox, 333, 340; *Bayley* v. *Williams*, 4 Giff. 638; L. R. 1 H. L. 200.

(*k*) *Bridgman* v. *Green*, 2 Ves. sr 627; *Maitland* v. *Irving*, 15 Sim. 437; *Vane* v. *V.*, 8 Ch. 383.

with the donor, may, in accordance with the usual principle, shelter himself behind his legal title and possession (*l*).

Undue influence in obtaining wills.

The consideration of undue influence employed in obtaining testamentary benefits is not within the purview of Courts of equity; but it may here be mentioned that a stronger case is required to set aside a will obtained by undue influence than is needed for the avoidance of a gift *inter vivos*. Thus a solicitor who has himself prepared a will may take a legacy therein, unless there is evidence of mistake, or of some misapprehension caused by him (*m*). In the absence of similar evidence a legacy to a Roman Catholic confessor has been sustained (*n*). In the case, however, of a bequest to a medical attendant under somewhat suspicious circumstances, it was said that the onus of proof lay heavily on him to maintain the validity of the will (*o*); and it has been laid down generally that though persuasion is not unlawful, pressure, of whatever character, if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence, though no force is either used or threatened (*p*). In short, it must be shown that the testator was induced to do what he did not deliberately intend to do. The mere proof that he acted under an unusual or inofficious or immoral motive will not suffice (*q*).

III. *Frauds so considered from their Inconsistency with the Policy of the Law.*

The third species of fraud in our enumeration comprises those cases which fall under the disapprobation of equity

(*l*) *Blackie* v. *Clark*, 15 Beav. 595; *Corbett* v. *Brock*, 20 Beav. 524.
(*m*) *Hindson* v. *Weatherill*, 5 De G. M. & G. 301.
(*n*) *Parfitt* v. *Lawless*, 2 P. & M. 462.
(*o*) *Ashwell* v. *Lomi*, 2 P. & M. 477.
(*p*) *Hall* v. *H.*, 1 P. & M. 481.
(*q*) *Wingrove* v. *W.*, 11 P. D. 81.

on account of their inconsistency with general public policy, or with some artificial policy of the law. Under this head might be appropriately considered almost the whole subject of unlawful agreements; but it will here suffice to deal in detail with those only in which the Courts of equity are particularly concerned.

1. **Transactions respecting marriage.**

Fraud relative to marriage.

(1.) One important class of cases coming under this head consists of those in which the action of one or more of the parties concerned is discountenanced on account of its mischievous interference with the policy of the law respecting marriage.

Marriage is encouraged by the law, and the marriage contract should above all others be the result of full and free consent. Generally speaking, then, transactions which tend to restrain or prevent marriage, or which tend to the deception of one or both of the parties thereto, are treated as against public policy.

Transactions in restraint of marriage are either in the form of conditions attached to voluntary gifts, or of the nature of contracts.

Conditions in restraint of marriage.

Conditions in restraint of marriage were the subject of elaborate argument in the case of *Scott* v. *Tyler* (*r*). In considering their effect, it is necessary to advert to certain consequences which spring from the fact that in dispositions of real property the Courts are guided by the principles of common law; whereas in bequests of personalty the rules of ecclesiastical law, derived from the law of Rome, form the basis of our jurisprudence. This distinction alone accounts for the different treatment of certain conditions according to whether they appear in dispositions of real or of personal property.

Condition precedent or subsequent.

The distinction also between conditions precedent and conditions subsequent must be observed. In the former

(*r*) 2 Bro. C. C. 431; 2 Dick. 712; 2 W. & T. L. C. 115.

case the estate does not vest in the beneficiary until the condition is complied with. Thus the condition opens the door to a benefit, and is therefore entitled to a favourable construction, and to support if at all reasonable. But a condition subsequent only operates after the estate has vested in the beneficiary; and its effect being thus penal, it is to be strictly construed. The difference in effect of these two cases will best be seen by the aid of the illustration afforded by actual decisions.

Conditions precedent.

First, as to conditions precedent.

In gifts of land.

A condition precedent attached to a voluntary disposition of land is illustrated by cases in which a devise is made, or a portion directed to be raised out of land, on the condition of the beneficiaries marrying only with the consent of certain persons. Such a condition is valid, and no estate vests until it is complied with (*s*). In this case, moreover, the rules applicable to gifts of personalty are the same (*t*).

In gifts of personalty.

Conditions subsequent in particular restraint.

In considering conditions subsequent, it is necessary to distinguish between a condition imposing a particular restraint and one which would have the effect of restraining marriage generally. Whether the property concerned be real or personal, it is permissible to bestow it subject to a condition subsequent prohibiting marriage with a particular person (*u*), or with a native of a particular country (*x*), or belonging to a particular religious body (*y*); or marriage may be forbidden until the attainment of a reasonable age, which is not restricted to majority (*z*).

In general restraint of

Conditions subsequent in general restraint of marriage

(*s*) *Fry* v. *Porter*, 1 Ch. Ca. 138; 1 Mod. 300; *Harvey* v. *Aston*, 1 Atk. 361.

(*t*) *Scott* v. *Tyler*, 2 Bro. C. C. 431; *Younge* v. *Furze*, 8 De G. M. & G. 756; *Malcolm* v. *O'Callaghan*, 2 Madd. 349.

(*u*) *Jervois* v. *Duke*, 1 Vern. 19.

(*x*) *Perrin* v. *Lyon*, 9 East, 179.

(*y*) *Duggan* v. *Kelly*, 10 Ir. Eq. Rep. 295.

(*z*) *Stackpole* v. *Beaumont*, 3 Ves. 89; *Younge* v. *Furze*, *sup.*; *Hampton* v. *Nourse*, (1899) 1 Ch. 63; 68 L. J. Ch. 15.

attached to a gift of personal property are *primâ facie* void, and the gift remains unaffected thereby (*a*). gifts of personalty.

But, where the gift is to a woman, and the intention of the donor appears to be not to restrain marriage, but merely in good faith to make a provision for her as long as she remains single, a limitation of personal property until marriage has been sustained (*b*). Limitation over on marriage.

A condition subsequent in general restraint of marriage, attached to a gift of real estate, is, it seems, valid (*c*); *à fortiori* if in this case the intention appears to be to create a provision for a woman until marriage (*d*). In gifts of real estate.

It must be observed that conditions in general restraint of marriage are always valid in gifts to widows, and are indeed matters of every-day occurrence (*e*); and this not only in the case of a bequest by a testator to his own widow, but also in a gift to the widow of another person (*f*). A gift over on the second marriage of a man has also been sustained (*g*). Second marriages not within the rule.

(2.) Contracts in restraint of marriage are, on the same principles as conditions to that effect, considered fraudulent and void. Contracts in restraint of marriage.

Thus, where a woman gave a bond conditioned to be paid in case she married again, it was on her marriage ordered to be delivered up (*h*).

Similarly, a contract to marry a particular person who is not bound by a corresponding obligation is invalid as opposed to public policy (*i*). A contract by which persons are mutually bound to marry is valid at law (*k*), but Contracts to marry,

(*a*) See *Morley* v. *Rennoldson*, 2 Ha. 570; (1895) 1 Ch. 449; 64 L. J. Ch. 485; *Jenner* v. *Turner*, 16 Ch. D. 185; *Bellairs* v. *B.*, 18 Eq. 510.

(*b*) *Webb* v. *Grace*, 2 Ph. 701; *Heath* v. *Lewis*, 3 De G. M. & G. 954.

(*c*) *Harvey* v. *Aston*, 1 Atk. 380, note.

(*d*) *Jones* v. *J.*, 1 Q. B. D. 279.

(*e*) *Craven* v. *Brady*, 4 Eq. 209; 4 Ch. 206.

(*f*) *Charlton* v. *Coombes*, 11 W. R. 1038; *Newton* v. *Marsden*, 2 J. & H. 356.

(*g*) *Allen* v. *Jackson*, 1 Ch. D. 399. For a concise summary of these rules respecting conditions, see Pollock on Contracts, p. 336, 6th ed.

(*h*) *Baker* v. *White*, 2 Vern. 215.

(*i*) *Key* v. *Bradshaw*, 2 Vern. 102.

(*k*) *Cock* v. *Richards*, 10 Ves. 429, 438.

frauds on parents, &c.

will be set aside in equity if it amounts to a fraud upon a parent or person *in loco parentis*, as in *Woodhouse* v. *Shepley* (*l*), where the father of the lady was known to be opposed to the match, and the suitors clandestinely entered into mutual bonds to marry each other after his death, under a penalty of £600.

Marriage brokage contracts

Transactions also known as marriage brokage contracts, in which a person undertakes for a stipulated reward to bring about a certain marriage, are void as frauds upon public policy, and as necessarily involving the deception of one of the parties to the marriage or of the parents (*m*).

are void;

Such contracts being void are incapable of confirmation (*n*), and money paid thereunder may, it seems, be recovered back (*o*).

so contracts tending to deceive one of the parties.

On the same principle, every contract by which a parent or guardian seeks to obtain any remuneration for promoting or consenting to the marriage of his child or ward is void (*p*). And generally all contracts upon a treaty of marriage which tend to deceive or mislead one of the parties to it or their relatives are deemed fraudulent and void. Thus, a security given by a son without the privity of his parents to return part of the portion of his wife was held to be invalid (*q*); and where a man, on the treaty for the marriage of his sister, lent her money, in order to increase her apparent portion, and she gave a bond for its repayment, this bond was decreed to be given up (*r*). In such transactions as these, relief will be given, even on the suit of a *particeps criminis*, the public interest causing a departure from the usual rule that a plaintiff in equity must come with clean hands.

Attempts to separate husband and wife.

(3.) With equal or greater reason, any attempts to effect a separation between a husband and wife through the

(*l*) 2 Atk. 535.
(*m*) *Roberts* v. *R.*, 3 P. Wms. 65, 76; *Hall* v. *Thynne*, 9 Show. P. C. 76.
(*n*) *Cole* v. *Gibson*, 1 Ves. sr. 503.
(*o*) *Smith* v. *Bruning*, 2 Vern. 392.
(*p*) *Keat* v. *Allen*, 2 Vern, 588; *Hamilton* v. *Mohun*, *ib.* 652.
(*q*) *Turton* v. *Benson*, 1 P. Wms. 496.
(*r*) *Gale* v. *Lindo*, 1 Vern. 475.

means of a conditional gift, are discountenanced. If a bequest is made on condition of such a separation, the condition is absolutely void, and the bequest remains unfettered (*s*). In a more recent case, where an annuity was conditioned on a married woman continuing to live apart from her husband, the Court refused to give effect to the condition after a reconciliation had taken place (*t*).

Agreements to influence testators.

2. On a somewhat analogous principle, agreements to use influence with a testator in favour of a particular person or object are considered void (*u*). It has recently been decided that the doctrine of estoppel by representation does not so apply as to compel a testator to make good a representation of his intention to confer a benefit by his will (*x*). But an express contract so to do, supported by valuable consideration, has been otherwise treated (*y*).

Contracts in restraint of trade.

3. Another class of transactions void as contravening the policy of the law are contracts in general restraint of trade. This part of the subject does not indeed present for consideration any principles distinctively equitable, the Courts of law having long been as jealous as those of equity of any agreement tending to promote monopolies or discourage industry and just competition (*z*). Equity also recognises the same exceptions as prevailed at law, to the effect that special and limited restraints are lawful; for instance, a restraint against carrying on business at a particular place or within a defined area, or with certain specified persons, or for a limited time. In all such cases

(*s*) *Tennant* v. *Brail*, Toth. 141; *Brown* v. *Peck*, 1 Ed. 140.

(*t*) *Wren* v. *Bradley*, 2 De G. & Sm. 49; and see *Trafford* v. *Maconochie*, 39 Ch. D. 116; 57 L. J. Ch. 936.

(*u*) *Debenham* v. *Ox*, 1 Ves. sr. 276.

(*x*) *Maddison* v. *Alderson*, 8 App. Cas. 467, 473.

(*y*) *De Beil* v. *Thomson*, 3 Beav. 469; 12 Cl. & F. 45; *Loffus* v. *Maw*, 3 Giff. 592; *Synge* v. *S.*, (1894) 1 Q. B. 466; 63 L. J. Q. B. 202.

(*z*) See *Bunn* v. *Grey*, 4 East, 190; *Mumford* v. *Gething*, 7 C. B. (N. S.) 305; *Leather Cloth Co.* v. *Lorsont*, 9 Eq. 345; and the leading authority of *Mitchel* v. *Reynolds*, 1 P. Wms. 181; 1 Sm. L. C. 406.

the Court will judge of the reasonableness or otherwise of the restriction in view of the particular circumstances of the case in question, and support or subvert the contract accordingly (*a*). A restraint unrestricted in area was held not unreasonable in the case of a business in arms and ammunition (*b*). The question depends on whether the business complained of is effectually competitive with that of the plaintiff, and whether the restraint imposed is greater than is reasonably required for his protection (*c*). In determining this the Court will, if necessary, sever the contract, enforcing it so far as reasonable but no further (*d*). Similarly, a person may sell the secret of a particular process of business and restrain himself from using it in future (*e*). And even apart from a specific contract an employé may be restrained from abusing the confidence reposed in him by disclosing secrets learned in his employment (*f*). A contract to that effect is implied from the relation itself.

Agreements prejudicial to the administration of government and justice, to influence officers of State,

4. Another class of transactions which here invites attention comprises those discountenanced on account of their tendency to interfere with the proper administration of government and of justice. Agreements to corrupt or improperly to influence any officer of State, whether executive or judicial, are obviously void; and so suspicious is the law of everything which threatens danger of this kind,

(*a*) *Ehrmann* v. *Bartholomew*, (1898) 1 Ch. 671: 67 L. J. Ch. 319; *Robinson* v. *Heuer*, (1898) 2 Ch. 451; 67 L. J. Ch. 644; *Underwood* v. *Barker*, (1899) 1 Ch. 301; 68 L. J. Ch. 201; *Haynes* v. *Doman*, (1899) 2 Ch. 13; 68 L. J. Ch. 419; *Mills* v. *Dunham*, (1891) 1 Ch. 576; 60 L. J. Ch. 362; *Evans* v. *Ware*, (1892) 3 Ch. 502; 62 L. J. Ch. 256.

(*b*) *Maxim-Nordenfeldt Co.* v. *Nordenfeldt*, (1894) A. C. 535; 63 L. J. Ch. 908.

(*c*) *Drew* v. *Guy*, (1894) 3 Ch. 25; 63 L. J. Ch. 547; *Badische Anilin Co.* v. *Schott*, (1892) 3 Ch. 447; 61 L. J. Ch. 698; *Perls* v. *Saalfield*, (1892) 2 Ch. 149; 61 L. J. Ch. 409.

(*d*) *Rogers* v. *Maddocks*, (1892) 3 Ch. 346; 62 L. J. Ch. 219; *Darowski* v. *Goldstein*, (1896) 1 Q. B. 478.

(*e*) *Bryson* v. *Whitehead*, 1 S. & S. 74; *Harms* v. *Parsons*, 32 Beav. 328.

(*f*) *Merryweather* v. *Moore*, (1892) 2 Ch. 518; 61 L. J. Ch. 505; *Robb* v. *Green*, (1895) 2 Q. B. 1; 64 L. J. Q. B. 593; *Lamb* v. *Evans*, (1892) 3 Ch. at p. 468; 61 L. J. Ch. 681.

that any agreements which have an apparent tendency in that direction are equally held void, though an intention to use unlawful means be disclaimed (*g*).

Similarly, apart from the provisions of statutes, which are very comprehensive in their extent, agreements for the buying, selling, or procuring of public offices are wholly void as well at law as in equity (*h*). Other instances of contracts deemed illegal on similar principles are referred to under the head of Injunctions (*i*). buying and selling offices.

IV. *Frauds on Third Persons.*

The last species of fraud which remains to be considered comprises frauds so considered from their inequitable interference with the private rights of third persons not parties to the fraudulent transaction.

These are of two classes: first, where such third person is deceived by the misrepresentation or concealment of one of the parties to the transaction: secondly, the fraudulent exercise of powers for purposes other than those intended by the donor of the power.

1. *Deception of Third Persons.*

The consideration of this subject brings before us again questions very similar to those dealt with under the first head, or actual fraud; and generally speaking the characteristics of misrepresentation and concealment there exhibited are equally applicable here. There are, however, some important cases touching the particular application of them in the circumstances now under view, to which it behoves us to advert. Deception of third person

(*g*) Pollock, Cont. 309 ff, 6th ed.; *Egerton* v. *Brownlow*, 4 H.L. 1—250.

(*h*) *Harrington* v. *Du Chastel*, 2 Swanst. 159, n.; *Hartwell* v. *H.*, 4 Ves. 811.

(*i*) *Infra*, p. 800.

by fraudulent misrepresentation.

Both misrepresentation and concealment may be treated as fraudulent, not only by a party to the transaction who is deceived, but also in some circumstances by third parties who suffer thereby.

Rules in *Barry* v. *Crosskey*.

As to misrepresentation as affecting third parties, the following rules were laid down by Lord Hatherley in *Barry* v. *Crosskey* (*k*):—

(1.) "Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified—provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss" (*l*).

(2.) "The injury must be the immediate and not the remote consequence of the representation thus made" (*m*).

But the absence of a contractual relation, mere negligence or forgetfulness (as in *Slim* v. *Croucher* (*n*)), does not now suffice to give a right of action to the third person (*o*).

By concealment.

Savage v. *Foster*.

As to concealment as injuriously affecting third parties, a leading authority is *Savage* v. *Foster* (*p*), which decided that a person knowing his own title, and not giving notice of it to a purchaser, could not be allowed to set it up against the purchaser; and that the coverture of the person was no protection to the transaction.

In this case a married woman, knowing herself to be tenant in tail of property subject to her mother's life interest, upon the marriage of her half-sister, induced her mother to convey the lands to her for life, with remainder to the intended husband in fee. The husband under this

(*k*) 2 J. & H. 1, 22.

(*l*) See *Angus* v. *Clifford*, (1891) 2 Ch. 449; 60 L. J. Ch. 443; *Slim* v. *Croucher*, 1 De G. F. & J. 518.

(*m*) See also *Att.-Gen.* v. *Ray*, 9 Ch. 397; *Cann* v. *Wilson*, 39 Ch. D. 39; 57 L. J. Ch. 1034; *Andrews* v. *Mockford*, (1896) 1 Q. B. 372; 65 L. J. Q. B. 302, distinguishing *Peek* v. *Gurney*, L. R. 6 H. L. 377.

(*n*) *Sup.*

(*o*) *Le Lievre* v. *Gould*, (1893) 1 Q. B. 491; 62 L. J. Q. B. 353; *Low* v. *Bouverie*, (1891) 3 Ch. 82; 60 L. J. Ch. 594.

(*p*) 9 Mod. 35; 2 W. & T. L. C. 620.

title, and with no notice of the tenancy in tail, sold to a *bonâ fide* purchaser. It was held that the married woman could not set up her title against the purchaser, and that her right was extinguished.

In this case there was active interposition to induce the conveyance; but the same principle has been applied where a person has simply stood by and permitted others to deal with the property in a manner inconsistent with his rights. If, knowing of such a transaction, he does not give the purchaser notice, he cannot afterwards avoid the purchase (*q*).

Denying incumbrances.

So, if upon inquiry being made, a person denies the existence of an incumbrance, he cannot afterwards set it up against the purchaser (*r*). But in this case mere silence has been held not sufficient to avoid the incumbrance, unless at least inquiry is made (*s*). The distinction between this and the case of an owner lying by is plain, since there is nothing inconsistent in the sale of property subject to an incumbrance, and the incumbrancer might have assumed that the transaction was of that character.

Purchaser misled in ignorance.

Even if a person in ignorance of his rights misleads a purchaser, the purchaser will be relieved against him if the circumstances were such that he ought to have known his rights; as where a father stands by and allows his son to dispose of a fee simple, supposing the fee was in the son, while in fact it was in the father himself, subject to the son's life estate (*t*).

Suffering money to be expended in mistake.

The same principle applies to a case in which a person stands by and suffers another to lay out money on his property, supposing it to be his own. At law he could still have asserted his title without making compensation for the improvements; but in equity the person who had so expended money would be entitled to be indemnified

(*q*) *Hobbs* v. *Norton*, 1 Vern. 136.
(*r*) *Ibbotson* v. *Rhodes*, 2 Vern. 554.
(*s*) *Osborn* v. *Lea*, 9 Mod. 96.
(*t*) *Teasdale* v. *T.*, Sel. Ch. Ca. 59.

either by a pecuniary compensation, or sometimes, as in the case of a lessee under a defective lease, by a confirmation of his title (*u*). The case is strengthened if there is some fiduciary relation, such as that of agency, between the parties (*x*).

But a person spending money by mistake upon the property of another has no equity against the owner, if he was ignorant of the expenditure; except in so far that if it is necessary for the owner himself to seek the assistance of equity with respect to the property, he will be required to do equity by making compensation as a condition of obtaining relief (*y*). And if after notice of an adverse title, a person proceeds to lay out his money, equity will not assist him merely because no active steps have been taken to establish the title (*z*).

On a somewhat similar principle it has been held that where a man procures a contract by representing a certain state of facts, equity will not suffer him by any subsequent act of his own to falsify the representation (*a*), as, for example, where land is leased on restrictive covenants as to user, on the representation that the adjoining land will be let subject to similar restriction.

Coverture or infancy no excuse.

The case of *Savage* v. *Foster* (*b*) shows that coverture is no excuse for such instances of fraud as those we are now considering; it is equally well established that infancy affords no better protection (*c*). An infant cannot, it is true, be made answerable in equity any more than at law for a contract which he has made during his minority, on the mere ground that, without any assertion on his part,

(*u*) *Beaufort* v. *Patrick*, 17 Beav. 60, 75; *Price* v. *Neault*, 12 App. Cas. 110; 56 L. J. P. C. 29.

(*x*) *Cawdor* v. *Lewis*, 1 Y. & C. Ex. 427.

(*y*) *Neesom* v. *Clarkson*, 4 Ha. 97; *Willmott* v. *Barber*, 15 Ch. D. 96.

(*z*) *Master of Clare Hall* v. *Harding*, 6 Ha. 273; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129, 141.

(*a*) *Renals* v. *Cowlishaw*, 11 Ch. D. 866; 48 L. J. Ch. 830; *Spicer* v. *Martin*, 14 App. Cas. 12; 58 L. J. Ch. 309; *Mackenzie* v. *Childers*, 43 Ch. D. 265; 59 L. J. Ch. 188.

(*b*) 9 Mod. 35.

(*c*) *Watts* v. *Cresswell*, 2 Eq. Ca. Ab. 515.

the other party believed him to be of full age (*d*); but he is not suffered to take advantage of his own wrong (*e*).

2. *Frauds on powers.*

Powers must be exercised *bonâ fide*.

It is an established principle of equity that a donee of a limited power must execute it *bonâ fide* for the end designed. Otherwise the appointment, though good in law, will be held corrupt and void in equity.

A leading case on this subject is *Aleyn* v. *Belchier* (*f*).

A power of jointuring was executed in favour of a wife, but with an agreement that the wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts. It was held that this agreement was a fraud upon the power, and the execution was set aside, except so far as related to the annuity.

The appointor must, in exercising such a power, act *with good faith and sincerity, and with an entire and single view to the real purpose and object of the power. He cannot carry into execution any indirect object, or acquire any benefit for himself either directly or indirectly* (*g*). *And though the donee of a limited power may validly release it, he may not do so fraudulently any more than he can appoint fraudulently* (*h*).

Such is the general principle; and it includes cases in which there is not, as well as those in which there is, an antecedent agreement with the appointee to effect purposes not within the scope of the power; as well cases in which a benefit is sought to be attained for third parties foreign to the power, as those in which the appointor seeks to benefit himself. We may thus illustrate its application by four classes of cases.

(*d*) *Stikeman* v. *Dawson*, 1 De G. & Sm. 90.
(*e*) *Clarke* v. *Cobley*, 2 Cox. 173.
(*f*) 1 Eden, 132; 1 W. & T. L. C. 415.
(*g*) *Portland* v. *Topham*, 11 H. L. 32.
(*h*) *Cunynghame* v. *Thurlow*, 1 R. & M. 436, n.; *Harrison* v. *H.*, 40 Ch. D. 418.

Antecedent fraudulent agreement.

(1.) **Where there is an antecedent agreement**

(i.) For a benefit to the appointor himself.

For benefit of the appointor.

A frequent instance of this is where a father has a power of appointment among children, and he bargains with some of them for some benefit for himself, *e.g.*, the payment of his debts in consideration of the appointment in their favour. Such an appointment is deemed fraudulent and void, and the persons disappointed thereby are entitled to be put in the same position as if it had not been exercised (*i*). The same was held where the appointor bargained that the appointed fund should be lent to him (*k*), and also where the appointment was exercised in consideration of an agreement for the purchase of other expectant shares belonging to them (*l*); and where the appointment was made subject to a condition that a claim against the donee should be released (*m*).

(ii.) For the benefit of third parties foreign to the power.

For the benefit of strangers.

Instances of this are where the donee of a power of appointment among children stipulates for a benefit for his or her wife or husband, as in *Carver* v. *Richards* (*n*); or conversely, where a power of jointuring is exercised under a bargain for the benefit of the children. And, of course, a case in which there is not such close relationship between the parties stands on no better ground (*o*).

(2.) **Where there is no antecedent agreement,**

(i.) and the appointor seeks his own advantage.

Fraudulent design of appointor to

Perhaps the most flagrant example of this form of fraudulent appointment is where a father, having a power

(*i*) *Farmer* v. *Martin*, 2 Sim. 502; *Re Kirwan's Tr.*, 25 Ch. D. 373; 52 L. J. Ch. 952; *Bridger* v. *Deane*, 42 Ch. D. 9.

(*k*) *Arnold* v. *Hardwick*, 7 Sim. 343.

(*l*) *Cunynghame* v. *Anstruther*, 2 L. R. Sc. & D. 223.

(*m*) *Perkins* v. *Bagot*, (1893) 1 Ch. 283; 62 L. J. Ch. 531.

(*n*) 1 De G. F. & J. 548.

(*o*) *Birley* v. *B.*, 25 Beav. 299; *Whelan* v. *Palmer*, 39 Ch. D. 648; 57 L. J. Ch. 784. See and distinguish *Re Turner's Settled Estate*, 28 Ch. D. 205; 54 L. J. Ch. 690.

of raising portions for children, directs a portion to be raised long before it is required, or in favour of a sickly child, with a view to acquiring the money as next of kin of the child on its decease (*p*). benefit himself.

The case already cited of a fraudulent release may also be referred to in this connexion. Where a father released his power as to a part of the fund so as to vest it in himself as representative of a deceased son, the Court refused to give effect to the release (*q*). But such a release is not necessarily a fraud on the power by reason that in the event the father gains a pecuniary advantage thereby (*r*). In order to bring it within the principle the power must be coupled with a duty. Fraudulent release.

And an appointment is not necessarily invalid because the appointee is an infant (*s*), nor because the appointor may derive some benefit from the appointment. If the whole transaction, when looked at together, shows no appearance of *mala fides*, but only an intention to improve the whole subject-matter of the appointment, or to act in a prudent manner for the benefit of the objects of the power, there is no reason why the appointor should not participate in the improvement (*t*). So also an ultimate limitation in favour of the appointor may be unobjectionable (*u*).

In such cases the burden of proving a corrupt purpose is generally on the person who attempts to impeach the transaction (*x*), though the circumstances may be so strong against the appointor, for instance, where one appointment has already been set aside for fraud, that this position will

(*p*) *Hinchingbroke* v. *Seymour*, 1 Bro. C. C. 395; *Wellesley* v. *Mornington*, 2 K. & J. 143.

(*q*) *Cunynghame* v. *Thurlow*, 1 R. & M. 436, n.

(*r*) *Radcliffe* v. *Bewes*, (1891) 2 Ch. 662; 61 L. J. Ch. 186; *Somes* v. *S.*, (1896) 1 Ch. 250; 65 L. J. Ch. 262.

(*s*) *Beere* v. *Hoffmister*, 23 Beav. 101; *Fearon* v. *Desbrisay*, 14 Beav. 635.

(*t*) *Re Huish's Charity*, 10 Eq. 5; *Roach* v. *Trood*, 3 Ch. D. 430; *Henty* v. *Wrey*, 21 Ch. D. 332; 53 L. J. Ch. 667.

(*u*) *Cooper* v. *C.*, 5 Ch. 203.

(*x*) *Campbell* v. *Home*, 1 Y. & C. Ch. 664.

be reversed, and the appointor will be required to show the innocence of his act (*y*).

(ii.) Where the appointor intends benefit for strangers to the power.

Benefiting strangers.

The intention of the donor of the power in limiting the objects thereof must be strictly followed, and that intention extends as well to the persons entitled in default of appointment as to the objects themselves. To allow the appointor to depart from the terms of the power would be to substitute his purpose for that of the donor in the disposition of the donor's property (*z*). Thus, an appointment amongst children is invalidated by a reservation of a benefit for another person, for instance, a husband, though it may never have been communicated to him (*a*). And an attempt to impose upon the appointee a condition not authorised by the power falls within the same principle (*b*). Nor does it make any difference that the settlor himself is the donee of the power; having declared the trusts he must follow them (*c*).

The mere fact that the appointee, soon after the appointment, re-settles the property on other persons, not objects of the power, will not, in the absence of some further evidence of a bargain to that effect, invalidate the appointment. Such re-settlement is quite consistent with perfect good faith in the appointor (*d*).

Fraud prevails against volunteers under the donee.

It is further to be observed that a fraudulent execution of a power will be set aside not only as against the appointor, but also as against persons claiming under him as volunteers, or even as purchasers for valuable consideration, unless they acquire the legal estate without notice of

(*y*) *Topham* v. *Portland*, 5 Ch. 40, 62; *Humphrey* v. *Oliver*, 28 L. J. Ch. 406.

(*z*) *Topham* v. *Portland*, 1 De G. J. & S. 517; 11 H. L. 32.

(*a*) *Re Marsden*, 4 Drew. 594.

(*b*) *D'Abbadie* v. *Bizoin*, 5 I. R. Eq. 205; *Crawshay* v. *C.*, 43 Ch. D. 615; 59 L. J. Ch. 395; *Roach* v. *Trood*, 3 Ch. D. 429; but see also *Wainwright* v. *Miller*, (1897) 2 Ch. 255; 66 L. J. Ch. 616.

(*c*) *Lee* v. *Fernie*, 1 Beav. 483.

(*d*) *Routledge* v. *Dorril*, 2 Ves. jr. 357.

the fraud (*e*). If the purchaser takes the legal estate with notice, or the mere equitable estate even without notice, he cannot sustain his purchase against the persons entitled in default of appointment (*f*). But it seems that where he secures the legal estate, actual notice must be brought home to him; a mere suspicion will not suffice (*g*).

Fraudulent consent.

An appointment is equally invalid where the consent of certain persons is required, and such consent has been obtained by fraud (*h*), or, on the other hand, has been fraudulently given (*i*).

Partial fraud when wholly vitiating an appointment.

(3.) The question often arises, whether a fraudulent arrangement as to part of the property appointed vitiates the appointment *in toto*, or only as to the part to which the fraud extends. In the leading case of *Aleyn* v. *Belchier* we find an authority for the severance of the appointment, a part being sustained, and only the part intended for a corrupt or illicit purpose being set aside (*k*).

Where there is evidence by which the Court can distinguish what is attributable to an authorised purpose from what is tainted with fraud, the appointment may be severed, part being sustained, and part set aside (*l*). This is the case where, though the two appointments are contemporaneously made, the proper can be clearly distinguished from the improper transaction (*m*).

Contracts between appointees.

(4.) The case of an appointor executing an appointment in pursuance of a bargain inconsistent with the terms of the power, and therefore corrupt and invalid, must be distinguished from a case in which the appointees contract

(*e*) *Palmer* v. *Wheeler*, 2 Ba. & Be. 18.

(*f*) *Daubeny* v. *Cockburn*, 1 Mer. 626.

(*g*) *M'Queen* v. *Farquhar*, 11 Ves. 467.

(*h*) *Scroggs* v. *S.*, Amb. 272, 812.

(*i*) *Eland* v. *Baker*, 29 Beav. 137.

(*k*) See also *Lane* v. *Page*, Amb. 233; *Farmer* v. *Martin*, 2 Sim. 502; *Arnold* v. *Hardwick*, 7 Sim. 343; *Perkins* v. *Bagot*, (1893) 1 Ch. 283; 62 L. J. Ch. 531; *De Hoghton* v. *De H.*, (1896) 2 Ch. 385; 65 L. J. Ch. 528; *Daubeny* v. *Cockburn*, *sup.*

(*l*) *Topham* v. *Portland*, 1 De G. J. & S. 517; 11 H. L. 32.

(*m*) *Rowley* v. *R.*, Kay, 242; *Whelan* v. *Palmer*, 39 Ch. D. 648; 57 L. J. Ch. 784.

with each other to allow some benefit to the appointor. This is frequently the case where a parent has a power to appoint among children, and the children agree to deal with the fund by way of a family arrangement under which the parent is benefited. Such an arrangement will, indeed, be carefully scrutinised (*n*), but if it is found to be *bonâ fide* it will not be disturbed (*o*).

Motive of appointment immaterial.

Another distinction which it is important to indicate is that between the intention or purpose and the motive of an appointor. A corrupt purpose, as we have seen, vitiates the appointment; but if the appointment be within the terms of the power, the Court will not advert to circumstances of anger or resentment which may have induced an unequal appointment (*p*).

Illusory appointments.

Formerly, indeed, where a person had a non-exclusive power of appointment among a class, although with unfettered discretion as to the amount of the shares, and he appointed to some of the objects a merely nominal share, the appointment was set aside as being illusory and not *bonâ fide* following the intention of the power. This was done, for instance, where in appointing a fund of £100,000 amongst a class, the donee gave to one of the class five shillings only (*q*); and it was not necessary that the discrepancy should be so glaring as this. The difficulty, however, of determining the limits of what was illusory and what was not, was very great, and much litigation was occasioned. To avoid the inconveniences which were thus occasioned, the legislature interfered, and by 1 Will. IV. c. 46, it was enacted that after the passing of the Act, no appointment made in exercise of any power of appointment amongst several objects should be invalid or impeached in equity on the ground that an unsub-

1 Will. IV. c. 46.

(*n*) *Agassiz* v. *Squire*, 18 Beav. 431.

(*o*) *Davis* v. *Uphill*, 1 Swanst. 129.

(*p*) *Vane* v. *Dungannon*, 2 S. & L. 118, 130; *Supple* v. *Lawson*, Amb. 729.

(*q*) *Morgan* v. *Surman*, 1 Taunt. 289.

stantial, illusory, or nominal share only should be thereby appointed or left to devolve as unappointed.

Still there was nothing in the statute authorising an appointor under a non-exclusive power to omit entirely any one of the objects of the power. It was sufficiently absurd that an appointment should have been good if it gave £1,000 to A., £1,000 to B., and a shilling to C., but bad if the shilling was not given to C.; yet such was the law (*r*). The reasoning was that the gift of the shilling to C. was at least evidence that there had been no oversight in the execution (*s*). But now this distinction has disappeared, and since 37 & 38 Vict. c. 37, the difference between exclusive and non-exclusive powers has ceased to exist, an appointment under a power of the latter kind being no longer invalid on account of the omission of any of the objects. 37 & 38 Vict. c. 37.

(*r*) *Bulteel* v. *Plummer*, 6 Ch. 164. (*s*) *Re Stone*, 3 I. R. Eq. 621.

CHAPTER III.

MISTAKE AND ACCIDENT.

SECTION I.—MISTAKE.

Description.

I. *Mistakes of Law.*
   1. *Generally.*
   2. *Special circumstances entitling to relief.*

II. *Mistakes of Fact.*
   1. *Fundamental Mistakes.*
   2. *Unilateral Mistakes as to subject-matter.*
   3. *Mistakes of expression.*
      Rectification of instruments.
      Defective execution of powers.

Mistake indefinable.

IN distinguishing mistake from accident Story describes the former as "some intentional act, or omission, or error, "arising from ignorance, surprise, imposition, or misplaced "confidence" (*a*). This definition serves, as intimated, to distinguish between mistake and accident; but it fails to clearly mark the distinction which must be observed between mistake, pure and simple, and fraud. Mistake, of course, assumes an immense variety of forms and presents innumerable differences in degree; and if it is dangerous to define the forms of fraud lest the definition should be evaded by newly conceived devices, it is difficult to define mistake in such a manner as to indicate when it will and

(*a*) Story, 110.

when it will not legally affect a transaction, because it is impossible to foresee or provide for the infinite variety of forms which it will assume in the accidents of business. And since the meaning of the word is sufficiently clear, and no formula can be framed which will generalise the legal effects of mistake, little advantage can be gained by attempting a definition.

Classification of mistakes.

Most of the cases in which questions arise as to the effects of mistake relate to contracts, or dispositions of property. For purposes of classification we may, for the present, consider all such transactions as if they were between two parties only. It is evident, then, that there are three distinct species of mistake which may arise :—

(1.) One of the parties may be directly led into a mistake by an act or omission of the other party;

(2.) One of the parties may be mistaken apart from any consideration of the conduct of the other;

(3.) The mistake may be common to both parties.

Misrepresentations distinguished from pure mistake.

The first of these species introduces considerations and principles quite distinct from those which relate to the remaining two. Mistakes thus induced by one of the parties amount to misrepresentations. It depends on a variety of circumstances whether or not they will be regarded as amounting to frauds. These circumstances we have made the subject of investigation under the heading of Fraud (*b*).

Two species of mistakes remain, the examination of which is not complicated by the admixture of the elements of fraud. The importance of the distinction between them will appear when we enter on the consideration of mistakes of fact.

Mistakes of Law and of Fact.

The most familiar classification of mistakes is that which distinguishes between Mistakes of Law and Mistakes of Fact. The contrast between these two classes is sometimes expressed by saying that relief is given against mistakes of

(*b*) Pp. 167 *et seq.*

fact, but not against mistakes of law. But this statement is very far indeed from accuracy. On the one hand, there are many circumstances in which relief will be granted against mistakes of law. On the other hand, a mistake of fact does not of itself, even *primâ facie*, entitle a person to be relieved from the consequences of his acts.

I. *Mistakes of Law.*

Ignorantia juris, &c.

1. The familiar maxim "*Ignorantia juris neminem excusat*" expresses a principle which is necessary to the administration of justice. It has sometimes been stated that its operation is confined to the domain of criminal law (*c*); but it has long since been held as well in equity as at common law that parties may not, generally speaking, demand the rescission of their bargains or the reversal of their solemn acts on a ground so uncertain and difficult of determination as an alleged ignorance of law (*d*).

Limitation of the maxim.

The principle expressed by the maxim viewed thus broadly must certainly be assented to. But a close observation at once shows that a general expression in this form is far too vague to admit of being employed as a practical test. It presupposes an accurate knowledge of what is meant by law, and an unfailing power of discerning the precise boundary which distinguishes mistakes of law from mistakes of fact. Furthermore, it omits to take account of many peculiar circumstances which may render its application repugnant to common sense and to the elementary principles of equity. Before we can safely apply the maxim, we must, therefore, first inquire in what sense the term "law" is here used; and secondly, we must advert to certain special circumstances which are deemed to render a demand for relief both reasonable and equitable.

(*c*) *Lansdown* v. *L.*, Mos. 364; 2 J. & W. 205.
(*d*) *Stewart* v. *S.*, 6 Cl. & F. 911, 966.

(1.) The maxim evidently applies only to English law. No one is presumed to know the laws of foreign countries. They are invariably treated as matters of fact to be proved, like other matters of fact, by evidence. And it is to be observed that the laws of Scotland and of the Colonies are in this, as in other respects, deemed in our Supreme Court of Judicature to be foreign laws (*e*). Not applicable to foreign law.

(2.) Although public statutes are as fully presumed to be known as the general principles of civil and criminal law, this is not the case with respect to private Acts of Parliament. In the absence of notice of these latter, ignorance or disregard of them amounts to a mistake of fact, and may be relieved against (*f*). Nor to private statutes.

(3.) It was said by Lord Westbury, in *Cooper* v. *Phibbs* (*g*), that in the maxim under consideration the word "*jus*" was used in the sense of denoting general law, the ordinary law of the country; but that when the word "*jus*" was used in the sense of denoting a private right, the maxim had no application, private right of ownership being a matter of fact. But this qualification seems to be more apparent than real. Of course, if ignorance of the private rights of another is due to ignorance of the matters of fact which have led to those rights, the mistake is then merely one of fact, and falls outside the present question altogether. But if the facts are known, the legal consequences of those facts are most clearly presumed to be known; for these consequences are matters of general law, and must be included in the maxim if anything is. This is well illustrated in the case of *Pullen* v. *Ready* (*h*), where a devise was made to a woman upon condition that she should marry with her parent's consent: she married without such consent, whereupon a forfeiture accrued to other parties, who, though cognisant of the Its application to private rights considered.

(*e*) *Leslie* v. *Baillie*, 2 Y. & C. Ch. 91; *McCormick* v. *Garnett*, 5 De G. M. & G. 278.

(*f*) *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. sr. 472, 480.

(*g*) L. R. 2 H. L. 149, 170.

(*h*) 2 Atk. 587, 591.

marriage without consent, executed an agreement which had the effect of waiving the forfeiture. They sought relief from this agreement, alleging that they were ignorant of the fact that forfeiture had been occasioned by the marriage without consent; but it was refused them on the ground that the forfeiture was a legal consequence of the facts before them, that their mistake was thus one of law, and was not entitled to relief (*i*).

Special circumstances grounding title to relief.

2. Secondly, there are certain special circumstances under which, though the mistake alleged is undeniably one of law, it is deemed both reasonable and equitable to grant relief against it.

Fundamental mistake.

(1.) It is quite conceivable that the two parties to an agreement may both be labouring under a false impression as to a matter of law, the effect of which would be to make the agreement something entirely different from that which they intended. In such a case there is indeed no contract at all, the mutual agreement being different in substance from that which legally springs from their acts. It can scarcely be supposed that the law would in these circumstances enforce an agreement which was in truth never made by the parties at all. The question here is not whether a mistake of law will avoid a contract, but whether there ever was a contract. On the same principle an order made in an action which does not really express the intention of the parties may be set aside (*k*).

Mistake in formal expression.

The case is quite analogous where, an agreement having been made, it is erroneously expressed through a mistake of law. Here, again, to refuse relief against the erroneous expression would be to hold the parties to an agreement which they never made (*k*).

Misrepresentation actual fraud.

(2.) We have already excluded from the present consideration cases in which erroneous impressions respecting

(*i*) See also *Irnham* v. *Child*, 1 Bro. C. C. 92; *Bingham* v. *B.*, 1 Ves. sr. 126.

(*k*) See Pollock, Contr. ed. 6, 442; *Wilding* v. *Sanderson*, (1897) 2 Ch. 534; 66 L. J. Ch. 684; see also *Ainsworth* v. *Wilding*, (1896) 1 Ch. 673; 65 L. J. Ch. 432.

the law have been intentionally produced in the mind of one of the parties by the other. Persons so deceived are entitled to relief, for in such a case there exist the most conspicuous elements of actual fraud, and equity is ever ready to relieve against fraud, whatever form it may assume (*l*).

Implied fraud.

But circumstances less strong than active and wilful deception may suffice to evidence such a fraudulent disposition as to warrant the interference of equity for its discomfiture. For instance, if one of the parties to a transaction parts with his property in manifest ignorance of a plain and settled principle of law, the fact of allowing him so to act is often deemed to be sufficient evidence of an unfair advantage having been taken to call for equitable interposition. This has been illustrated by the case of an eldest son of an intestate agreeing, in ignorance of his rights of heirship, to divide the estates with a younger brother (*m*). But here, as before, the true ground of relief is not the fact of a mistake of law, but the fraud which is implied.

Surprise.

(3.) There are cases also in which a formal and solemn act performed in ignorance of a legal right has been reversed on the ground of mere surprise; for instance, where a woman who was entitled to elect, hastily decided in ignorance of her right to an account (*n*). Where the surprise has been common to both the parties to a transaction, there is of course still stronger ground for granting relief. Such cases approach more or less closely to those already mentioned, in which the error goes to the very foundation of the contract (*o*).

Matters of doubtful construction.

(4.) The maxim has no application where the alleged ignorance is not that of a well-known rule of law, but that of a matter of law arising upon a doubtful construction of

(*l*) *Willan* v. *W.*, 16 Ves. 72.

(*m*) Story, 122; *Hunt* v. *Rousmaniere*, 1 Peters, Sup. C. U. S. 1, 15, 16.

(*n*) *Pusey* v. *Desbouverie*, 3 P. Wms. 315, 321; and *Evans* v. *Llewellyn*, 2 Bro. C. C. 150; 1 Cox, 333; *Allcard* v. *Walker*, (1896) 2 Ch. 369; 65 L. J. Ch. 660.

(*o*) See *Cochrane* v. *Willis*, 1 Ch. 58.

an instrument. In this case relief may be given (*p*). But where in such circumstances a fair compromise is entered into without any circumstances of fraud or surprise it will not be afterwards disturbed (*q*).

Family compromises upheld.

(5.) Especially is this the case where such compromise is of the nature of a family arrangement (*r*). In *Westby* v. *W.* (*s*), Lord St. Leonards said: "Wherever doubts "and disputes have arisen with regard to the rights of "different members of the same family, and fair compro- "mises have been entered into to preserve the harmony "and affection, or to save the honour of the family, those "arrangements have been sustained by this Court; albeit, "perhaps, resting on grounds which would not have been "considered satisfactory if the transaction had occurred "between mere strangers" (*t*). Long course of dealing and acquiescence by the parties concerned may suffice to sustain an arrangement of the nature of a family compromise, where there has been no written contract (*u*).

Unless tainted with fraud.

But an agreement cannot be sustained, even as a family arrangement, if in the least degree tainted with fraud; there must be full disclosure of all material circumstances known to one of the parties (*x*), and especially so if the parties are not on equal terms, or there is any confidential relation between them (*y*). Nor will a family arrangement be sustained if one of the parties has entered into it under a simple misunderstanding of his interests, respecting which there could be no reasonable doubt (*z*). Of course, such circumstances as threats, or undue influence of any kind, will in these, as in other cases, invalidate an agreement (*a*).

(*p*) *Beauchamp* v. *Winn*, L. R. 6 H. L. 223.
(*q*) *Pickering* v. *P.*, 2 Beav. 56; *Naylor* v. *Winch*, 1 S. & S. 564; *Miles* v. *N. Z. &c. Co.*, 32 Ch. D. 266; 56 L. J. Ch. 801.
(*r*) *Stapilton* v. *S.*, 1 Atk. 2.
(*s*) 2 Dr. & W. 503.
(*t*) See *Cory* v. *C.*, 1 Ves. sr. 19.
(*u*) *Williams* v. *W.*, 2 Dr. & S. 378; 2 Ch. 294; *Clifton* v. *Cockburn*, 3 My. & K. 76.
(*x*) *Gordon* v. *G.*, 3 Swanst. 400.
(*y*) *Pusey* v. *Desbouverie*, 3 P. Wms. 315.
(*z*) *Dunnage* v. *White*, 1 Swanst. 137.
(*a*) *Ellis* v. *Barker*, 7 Ch. 104.

Mistakes of expression in the instrument embodying such compromises will be relieved against just as similar mistakes occurring elsewhere (*b*), and so if litigation is compromised in Court under a misapprehension (*c*). Mistakes of expression in compromises.

(6.) Where money has been voluntarily paid under a mistake of law, a Court of equity will not, as a rule, order its repayment. Thus, where both an executor and a legatee were independently advised by counsel against the claim of the legatee, and the executor divided the estate in accordance with the opinions given, the Court refused to disturb the transaction when it was subsequently discovered that the construction put on the will was wrong (*d*). If, however, under such circumstances there exists a fiduciary relation between the parties, or an equity is raised by the conduct of one of them, relief may be given (*e*); and payment which is *exacted*, such as a toll, is distinguishable (*f*). Payments by mistake.

Where money has been paid in mistake of law to one of the officers of the Court, such as a trustee in bankruptcy, or a receiver, the Court has ordered its repayment, considering that it should set an example of an honesty higher than it would be justified in all cases in enforcing on the litigants before it (*g*).

With these explanations and limitations, the principle that equity will not relieve against a mistake of law may be safely accepted; and it will have been observed that those cases in which relief is given do not really amount to exceptions from the principle, since *in all of them the relief is grounded, not on the mere fact that there has been a mistake, but on some other fact which is, independently of that, efficacious to call forth the remedial power of equity.*

(*b*) *Ashurst* v. *Mill*, 7 Ha. 502.

(*c*) *Hickman* v. *Berens*, (1895) 2 Ch. 638; 64 L. J. Ch. 785.

(*d*) *Rogers* v. *Ingham*, 3 Ch. D. 351; and see *Powell* v. *Hulkes*, 33 Ch. D. 552; 55 L. J. Ch. 846.

(*e*) *Rogers* v. *Ingham*, *sup.* at p. 357; *Davis* v. *Morier*, 2 Coll. 303.

(*f*) *Hooper* v. *Corp. of Exeter*, 56 L. J. Q. B. 457.

(*g*) See *Exp. James*, 9 Ch. 609; *Exp. Simmonds*, 16 Q. B. D. 308; 55 L. J. Q. B. 374; *Dixon* v. *Brown*, 32 Ch. D. 597; 55 L. J. Ch. 556; *Re Opera, Limited*, (1891) 2 Ch. 154; 3 Ch. 260; 60 L. J. Ch. 839.

II. *Mistakes of Fact.*

Mistake as such of no effect.

The inquiry as to the effects of mistakes in matters of fact is more complex and important. It must always be borne in mind that those cases, numerous though they are, in which transactions are deemed void or voidable on the ground of mistake, all constitute exceptions to the general rule, which is, that as regards private law, "mistake *as such* has no legal effects at all" (*h*). It will be found that in all cases in which legal effects follow, some other ingredient is present besides the mere fact that one or both of the parties have acted under an erroneous belief. In one large class of cases the effect of the mistake is to prevent any real contract from being formed at all; in these the agreements, though seemingly and formally valid, are in effect void. In another, though a valid agreement has been formed, owing to mistake in its expression, an equity is raised for its rectification, which though it could not be formerly effected in the Courts of common law, was provided for in those of equity. A third and important class comprises cases in which application is made to a special and discretionary jurisdiction of equity, in the exercise of which Courts of equity are particularly careful that their decrees shall not be productive of hardship. This class applies almost exclusively to suits for specific performance; and though the classification of the subject here would be clearly incomplete without reference to it, its full discussion falls more appropriately under the heading of specific performance (*i*).

1. *Fundamental mistakes.*

Where mistake prevents a contract from being formed.

By fundamental mistakes, we mean those the effect of which is to prevent any real contract from being formed between the parties. Contract requires consensual agreement; and if owing to some error on one or on both sides

(*h*) Pollock, Contracts, p. 424, 6th ed. (*i*) *Q. v.* p. 692 *et seq.*

the parties have never had a common intention, it follows that no contract is formed.

Fundamental errors of this description being as efficacious at common law as in equity to prevent an apparent agreement producing the effects of a legal contract, do not require exhaustive exposition here. It suffices to illustrate them from cases which from their nature or their accompaniments have usually fallen under the special notice of equity.

Mistake as to the nature of the transaction.

(1.) First, there may be a fundamental mistake as to the nature of the transaction itself. Mistakes of this description may be peculiar to one, or common to both parties.

Execution of deeds by mistake.

An instance of the former is seen where a person executes a deed or signs an instrument under a mistaken belief as to its contents. Naturally cases of this description usually raise questions of fraud as well as of simple mistake; but it is clear that without fraud such a transaction may even at law be invalidated on the ground of mistake alone (*k*). A strong illustration of this is afforded by a case in which a person executed a mortgage deed under the mistaken belief that it was only a covenant to produce deeds. This mortgage, having been assigned to a purchaser for value without notice, was nevertheless decreed to have been wholly void, and ordered to be delivered up to be cancelled (*l*). In this case had the deed only been voidable for fraud, no relief would have been given as against the *bonâ fide* purchaser for value.

A fortiori, if in such cases both parties are mistaken as to the nature of the deed or writing, the fact of a mere formal signature will not suffice to establish a contract.

Mistake as to person.

(2.) Secondly, one of the parties may be mistaken as to the person of the other party. Such mistakes are almost necessarily unilateral. It is evident that they are not in

(*k*) *Foster* v. *Mackinnon*, L. R. 4 C. P. 704, 711; *Kennedy* v. *Green*, 3 My. & K. 699, 717, 718; *Willis* v. *Barron*, (1902) A. C. 271.

(*l*) *Vorley* v. *Cooke*, 1 Giff. 230; *Hunter* v. *Walters*, 7 Ch. 75, 88.

all cases fundamental, since in many transactions the personality of the parties is quite immaterial; for instance, where a person sells goods for ready money, or a railway traveller takes a ticket. But in other cases it is of the very essence of the intention of one of the contracting parties to deal with another particular person, and if so, a mistake as to the person will invalidate the agreement (*m*); but it is at least questionable whether the same principle applies to deeds (*n*).

Mistake as to subject-matter.

(3.) Thirdly, the error may relate to the subject-matter of the contract.

If a person intends by his contract to acquire one thing, he cannot be required to accept another. If, however, the mistake is as to a specific article, the agreement in English as in Roman law is not void unless there is a complete difference of substance (*o*).

If subject-matter not in existence contract is void.

One important class comprised under this heading consists of those cases in which the subject-matter in the contemplation of the parties does not in fact exist at the time of the agreement. Where in these circumstances the mistake is common to both parties, the agreement is void (*p*).

On this principle a contract for the sale of shares in a company is void if, at the time of the agreement, a winding-up petition has been presented of which neither the vendor nor the purchaser knew (*q*). Similarly, a contract for the sale of a life interest after it has in fact, though without the knowledge of the parties, expired, is void (*r*); and likewise a contract for the sale of a freehold interest which is afterwards discovered to be already in the purchaser (*s*).

Not if it is confined to one party.

If in such cases the mistake is confined to one of the parties, the agreement is *primâ facie* valid (*ss*); but it will

(*m*) *Boulton* v. *Jones*, 2 H. & N. 564; *Smith* v. *Wheatcroft*, 9 Ch. D. at p. 230.

(*n*) *Hunter* v. *Walters*, 7 Ch. 75.

(*o*) *Kennedy* v. *Panama, &c. Mail Co.*, L. R. 2 Q. B. 580.

(*p*) *Couturier* v. *Hastie*, 5 H. L. 673.

(*q*) *Emmerson's case*, 1 Ch. 433.

(*r*) *Strickland* v. *Turner*, 7 Ex. 208; *Cochrane* v. *Willis*, 1 Ch. 58.

(*s*) *Jones* v. *Clifford*, 3 Ch. D. 779.

(*ss*) *Van Praagh* v. *Everidge*, (1902) 2 Ch. 266.

usually be found that there is some ingredient of fraud involved which will render it voidable at the option of the mistaken party; these cases are quite distinguishable from those now under view.

A person who stands by and knowingly suffers another to lay out money on his land under the mistaken belief that it is his own, may be decreed to repay such money; but if he is unaware of the outlay, or of the mistake, there is no equity against him (*t*).

Mistake as to quality or quantity when material.

Again, "a material error as to the kind, quantity, or "quality of a subject-matter which is contracted for by a "generic description may make the agreement void" (*u*).

Here again the agreement is only void in case the error is common to both parties (*x*), and is not capable of rectification in carrying out the contract (*y*). If only one is mistaken, it depends on circumstances presently considered whether or not it is voidable at his option (*z*). And the further limitation must be understood, that the difference is such as in the ordinary course of dealing and use of language amounts to a difference of kind.

Remedy as to void agreements.

Where an agreement is void on the ground of fundamental error, it is open to either party to bring his action in the Chancery Division to have the transaction declared void, to have any deeds or written instruments executed or signed therein set aside or cancelled, and to be relieved from any possible claims in respect thereof. But cases in which such relief is applicable must be distinguished from others in which, though in the documents expressing the contract, the terms are by common mistake inaccurately set out, nevertheless the real contract between the parties is clearly ascertainable. Where this is the case the proper remedy is a rectification of the instrument; while if under

(*t*) *Weller* v. *Stone*, 33 W. R. 421.
(*u*) Pollock, Contr. 462, 6th ed.
(*x*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597.
(*y*) *North* v. *Percival*, (1898) 2 Ch. 128; 67 L. J. Ch. 321; *Cowen* v. *Truefitt*, (1899) 2 Ch. 309; 68 L. J. Ch. 563.
(*z*) p. 220.

such circumstances the one party only was mistaken, he might, on the conditions presently to be considered, successfully claim rescission of the contract (*z*). Where an agreement has been sanctioned by the Court by an order made under mutual mistake, it may be set aside so long as the interests of third parties are not thereby prejudiced (*a*).

2. *Unilateral mistakes as to subject-matter.*

Agreements when voidable owing to mistake.

Though a strict regard for our classification would require us here to deal only with cases in which seeming agreements are made void owing to mistake, this is a convenient place to consider certain cases in many respects analogous to them, in which the mistake, though not actually involving fraud, produces a similar effect, and the agreement becomes only voidable at the option of the mistaken party, or perhaps, more strictly speaking, one of the parties is estopped from asserting that it is void.

Unilateral mistake,

This, as we have intimated, is often the case when a mistake which, if common to both parties would make the agreement void, is in fact confined to one of them. We have not to consider cases in which there is a distinct element of fraud, these being elsewhere investigated; our inquiry lies on the border line between them and the cases which have been up to the present occupying our attention.

to be of effect must be

The circumstance that one of the parties has entered into an agreement under the influence of a mistake of fact has no legal effect unless—

as to a material fact;

(i.) The fact is material to the transaction, or in other words, is essential to its character.

What is or what is not a material or essential fact is a question which scarcely admits of solution in general terms. Perhaps the closest practicable definition is that a fact is said to be material when the formation of the contract is

(*z*) *Paget* v. *Marshall*, 28 Ch. D. 255; 54 L. J. Ch. 575.
(*a*) *Huddersfield Bank* v. *Lister*, (1895) 2 Ch. 273; 64 L. J. Ch. 523.

conditional upon its existence; but whatever the general expression employed, the ultimate decision must remain a matter of opinion. It must suffice here to state by way of illustration that defects of title, extensive difference as to the locality of an estate, or as to its extent, will give a claim to a rescission of a contract in equity (*b*).

not due to negligence;

(ii.) The mistake is not due to the negligence of the mistaken party.

Equity will never encourage negligence; and it accordingly will not grant any relief against a mistake of fact, however material, if it be such that the complainant might have avoided it by the exercise of reasonable diligence. The mere fact, however, that he might possibly have acquired accurate knowledge, is not sufficient to debar him from relief (*c*).

as to a fact which there is an obligation to disclose.

(iii.) The fact is one which the party who has knowledge of it is under an obligation to disclose.

This excludes facts the means of information as to which are open to both parties; and cases in which each party is presumed to exercise his own skill and judgment, and there is no confidence reposed; and also facts which are in their nature doubtful, and as to the probabilities of which each may be supposed to calculate in his own discretion (*d*).

It is evident that this qualification almost, if not quite, amounts to the statement that a unilateral mistake is only relieved against when a non-disclosure by the better informed party amounts to fraud (*e*).

No relief against persons with an equal equity.

In cases arising out of transactions voidable on account of unilateral mistake, it must be remembered that equity will not interfere against a person who has an equal claim to its consideration. In these circumstances it will leave

(*b*) Story, 141; *infra*, pp. 737 *et seq.*

(*c*) *Willmott* v. *Barber*, 15 Ch. D. 96, 106.

(*d*) *Mortimer* v. *Capper*, 1 Bro. C. C. 158; 6 Ves. 24.

(*e*) See *Wright* v. *Goff*, 22 Beav. 207; *Met. Counties Soc.* v. *Brown*, 26 Beav. 454.

the law to prevail. Thus, no relief will be granted against a *bonâ fide* purchaser for valuable consideration (*f*).

3. *Mistakes of Expression.*

Mistakes of the kind last mentioned could from their nature only occur in mutual agreements. Those to which we now proceed may be found either in agreements or in voluntary dispositions of property. They occur whenever an agreement or disposition is sought to be embodied in a formal instrument, and the instrument is so framed as not to express clearly or truly the intention of the parties or party.

How far law remedies mistakes of expression.

(1.) At common law as well as in equity the simplest cases of this description have long been provided for by established rules of construction, which it suffices here to refer to in general terms. Thus, at law clerical errors and omissions which could be certainly supplied from the context, and all mere grammatical mistakes were remedied (*g*); the context of a doubtful expression might be referred to to ascertain its meaning (*h*), and the general intent was always regarded as prevailing over the particular expression (*i*).

Oral evidence.

(2.) Both at law and in equity indeed the rule has long been established that oral evidence is not generally admissible to vary a written instrument. But notwithstanding the existence of a written instrument, such evidence might even at law have been adduced to show that there was not in fact any agreement at all (*k*). In equity the general rule has been subjected to certain modifications which require particular notice.

For what purposes admissible at law.

In equity.

Thus, in equity oral evidence is admitted to show that either by accident, mistake, or fraud, a written instrument

(*f*) *Powell* v. *Price*, 2 P. Wms. 535; *Davies* v. *D.*, 4 Beav. 54.

(*g*) *Doe* d. *Leach* v. *Micklem*, 6 East, 486; *Redfern* v. *Bryning*, 6 Ch. D. 133; *Salt* v. *Pym*, 28 *ib.* 153; 54 L. J. Ch. 273.

(*h*) *Browning* v. *Wright*, 2 B. & P. 13, 26.

(*i*) *Ford* v. *Beech*, 11 Q. B. 866.

(*k*) *Pym* v. *Campbell*, 6 E. & B. 370; *Wake* v. *Harrop*, 6 H. & N. 775.

does not truly express the intention and meaning of the parties (*l*); and if accident or mistake is clearly proved by such evidence, or is admitted by the other side, or is evident from the nature of the case, equity will rectify it (*m*). Where a plaintiff sought to enforce a contract, but claimed for it a wider construction than that of the defendant, which was adopted by the Court, he was allowed to waive the dispute, and the contract was enforced to the extent to which the defendant admitted it (*n*).

Again, equity has resorted to extrinsic evidence to modify the meaning of general words where there has been reason to suppose that they were not intended to bear their full and natural meaning. For instance, in constructing a release, the general words are always limited to the matter or matters especially within the contemplation of the parties at the time when the release was given (*o*). One of the most important applications of this is seen in cases where a release is executed on the footing of accounts, which are subsequently found to be erroneous (*p*).

Rectification of settlements.

(3.) Perhaps the most striking illustrations of the jurisdiction of equity to rectify instruments which erroneously express the intention of the parties thereto, are found in cases respecting the rectification of marriage settlements, which cases usually arise when there is a discrepancy between the preliminary articles and the settlement as finally executed.

Rules.

The principal rules which regulate these cases are clearly stated in the leading authority of *Legg* v. *Goldwire* (*q*), and are to the following effect:—

(i.) *If both the articles and the settlement were executed*

(*l*) *Murray* v. *Parker*, 19 Beav. 305, 308.

(*m*) *Davis* v. *Symonds*, 1 Cox, 402, 404; *Fowler* v. *F.*, 4 De G. & J. 250.

(*n*) *Preston* v. *Luck*, 27 Ch. D. 497; and see *Goddard* v. *Jeffreys*, 51 L. J. Ch. 57.

(*o*) *L. & S. W. R.* v. *Blackmore*, L. R. 4 H. L. 610, 623; *Turner* v. *T.*, 14 Ch. D. 829.

(*p*) *Miller* v. *Craig*, 6 Beav. 433; *Gandy* v. *Macauley*, 31 Ch. D. 1.

(*q*) Ca. temp. Talb. 20; 1 W. & T. L. C. 17.

before the marriage, and there are discrepancies between them, then the settlement will generally be considered to express the true agreement, and equity will not interfere to make it conform to the articles.

(ii.) *But if, even in this case, the settlement purports to be in pursuance of the articles, then, if there be a discrepancy, it will be presumed to have arisen from mistake, and equity will interfere to rectify it* (*r*).

(iii.) *And further, even though the settlement does not upon the face of it purport to be in pursuance of the articles, extrinsic evidence may be resorted to to show that such was the intention, and that the discrepancy arose from mistake* (*s*).

(iv.) *If the articles preceded the marriage, and the settlement was executed after the marriage, then equity will in all cases consider that the articles express the true agreement, and will rectify the settlement to make it conform therewith.* The principle in this case is that after the marriage the parties are no longer in the same unfettered position, and that the agreement as expressed when they were free should be regarded as the true one (*t*).

Generally mistake must be common, and well defined and proved.

Generally speaking, in cases coming under the third of these rules, the Court will only interfere on evidence of a mistake common to all parties (*u*), and the extent of the rectification required must be clearly ascertained and defined by evidence contemporaneous with or anterior to the deed (*x*). But there are cases in which on proof of a clear mistake of one party only, the Court has taken upon itself to rectify a settlement (*y*), and it is especially disposed to do so by any unfair or underhand dealing on the part of the husband (*z*). A settlement has indeed been

(*r*) *West* v. *Errissey*, 1 Bro. P. C. 225.

(*s*) *Bold* v. *Hutchinson*, 5 De G. M. & G. 558; *Breadalbane* v. *Chandos*, 2 My. & Cr. 711, 739.

(*t*) *Legg* v. *Goldwire*, Ca. temp. Talb. 20; *Viditz* v. *O'Hagan*, (1899) 2 Ch. 569; (1900) 2 Ch. 87; 69 L. J. Ch. 507.

(*u*) *Sells* v. *S.*, 1 Dr. & Sm. 45; *Rooke* v. *Kensington*, 2 K. & J. 753, 764; *Fowler* v. *F.*, 4 De G. & J. 265.

(*x*) *Bradford* v. *Romney*, 30 Beav. 431.

(*y*) *Harbidge* v. *Wogan*, 5 Ha. 258; *Hanley* v. *Pearson*, 13 Ch. D. 545.

(*z*) *Clark* v. *Girdwood*, 7 Ch. D. 9.

rectified even against previous articles on the settlor's uncontradicted evidence of mistake (*a*), but the authority of this case is more than doubtful (*b*). Parol evidence in cases of rectification is not excluded by s. 4 of the Statute of Frauds (*c*).

A disentailing deed, enrolled under the Fines and Recoveries Act, has been rectified on the ground of mistake, notwithstanding the exclusion by s. 47 of that Act of the jurisdiction of Courts of equity in regard to the specific performance of contracts and the supplying of defects in the execution of powers given by the Act (*d*).

Rectification of voluntary deeds.

Courts of equity will not reform a voluntary deed as against the grantor (*e*), nor will they decree a settlement as against purchasers for valuable consideration (including mortgagees) who have had no notice of the articles; but if they have had such notice, a settlement may be decreed against them (*f*).

Rectification of wills.

(4.) The jurisdiction of equity to rectify mistakes in wills rests on widely different principles. In no case can oral evidence or any evidence *dehors* the will be admitted to vary or control the terms thereof. It is only when a mistake is apparent on the face of the will itself that the Court will interfere; oral evidence may be resorted to to explain a latent ambiguity.

Thus where a residue was directed to be divided between the testator's "two daughters equally," and in fact he had three daughters when the will was made, it was held that the three were entitled to share the property (*g*). A mistake in computing the amount of a legacy has similarly

(*a*) *Smith* v. *Iliffe*, 20 Eq. 666.
(*b*) *Tucker* v. *Bennett*, 38 Ch. D. 1; 57 L. J. Ch. 507; *Bonhote* v. *Henderson*, (1895) 2 Ch. 202; 64 L. J. Ch. 556.
(*c*) 29 Car. II. c. 3; *Johnson* v. *Bragge*, (1901) 1 Ch. 28; 70 L. J. Ch. 41.
(*d*) 3 & 4 Will. IV. c. 74; *Hall-Dare* v. *H.-D.*, 31 Ch. D. 251; 55 L. J. Ch. 254.
(*e*) *Phillipson* v. *Kerry*, 32 Beav. 628.
(*f*) *Davies* v. *D.*, 4 Beav. 54.
(*g*) *Stebbing* v. *Walker*, 2 Bro. C. C. 857.

been set right (*h*), and also mistakes in clerical expression which result in manifest incongruity (*i*).

A mere misdescription of a legatee will not defeat a legacy; but if a legacy is given to a person for a particular motive dependent on a supposed character which he has falsely assumed, he will not be suffered to demand his legacy. This was the case where a woman gave a legacy to a man supposing him to be her husband, whereas in fact the marriage was bigamous and void (*k*). *Vice versâ*, if a legacy is revoked upon a mistake of facts, for instance, on the supposition that the legatee is dead, equity will grant relief (*l*). But in cases of this description, whether the suit be to set aside or to establish a legacy on the ground of mistake, the Courts proceed with great circumspection. It does not follow that because one motive is expressed or is apparent, that the legacy is intended to depend upon it alone. The testator may be in some degree moved to confer a benefit by an erroneous supposition of relationship between himself and the beneficiary; but nevertheless the primary motive may be a personal love and affection which exist altogether apart from the fact of such relationship; and if this seems to be the case, equity will not, on mere proof that the supposed relationship did not exist, interfere to take away the benefit (*m*). Still less will proof that a testator has formed a false estimate of the character of a person form a ground for interfering with his testamentary dispositions. Equity never assumes to punish moral delinquencies by taking away civil rights (*n*). The principles of equity are, as we have seen, now applicable in all divisions of the High Court, and it

(*h*) *Milner* v. *M.*, 1 Ves. sr. 106; but see and distinguish *Ward* v. *Wood*, 32 Ch. D. 517; 55 L. J. Ch. 720; *Re Aird's Estate*, 12 Ch. D. 291.

(*i*) *Salt* v. *Pym*, 28 Ch. D. 153; 54 L. J. Ch. 273; *Mellor* v. *Daintree*, 33 Ch. D. 198; 56 L. J. Ch. 33.

(*k*) *Kennell* v. *Abbott*, 4 Ves. 808; *Giles* v. *G.*, 1 Keen, 692.

(*l*) *Campbell* v. *French*, 3 Ves. 321.

(*m*) *Kennell* v. *Abbott*, *sup.*; *Box* v. *Barrett*, 3 Eq. 244.

(*n*) *Giles* v. *G.*, *sup.*

must be borne in mind that in many cases arising from mistakes in wills the Probate Division is the proper forum in which to seek relief (*o*).

(5.) *Defective execution of powers.*

One of the most useful heads of the jurisdiction of equity in relieving against accident and mistake, is its power to interfere in aid of the defective execution of powers. The principles on which it acts in these cases have been thus expressed by an eminent authority: "Whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir (or other person benefiting by the default) to make him perfect this intention" (*p*).

The investigation of this subject resolves itself into the following inquiries:—

(i.) To what powers the principle applies; (ii.) What defects or mistakes will be relieved against; (iii.) In whose favour equity will so interfere.

(i.) **To what powers the principle applies.**

To what powers the principle applies.

Generally speaking it matters not what is the nature of the power respecting which the assistance of equity is sought. The cases in which it is material are exceptional. Thus powers of sale, of raising portions, of jointuring, of revoking uses, and of appointment generally, are continually the subjects of equitable relief.

Powers of leasing.

Powers of leasing were at one time thought to form an exception to the general rule, but it has long been established that this is not so, and that a defective execution may in this as in other cases be aided (*q*). In certain

(*o*) See *e.g. Morell* v. *M.*, 7 P. D. 68; *Meluish* v. *Milton*, 3 Ch. D. 27; *inf.*, p. 808.

(*p*) *Chapman* v. *Gibson*, 3 Bro. C. C. 229, per Lord Alvanley.

(*q*) *Shannon* v. *Bradstreet*, 1 S. &

cases of deviation from the terms of a power of leasing there is a special relief afforded to the intended lessee by statute (*r*), and such relief is available even if the power has been derived under an Act of Parliament.

Powers arising under an Act of Parliament.

But generally speaking powers arising under an Act of Parliament are construed strictly, and a defect in their execution will not be relieved against in equity (*s*).

(ii.) **What defects will be relieved against.**

Intention must be clear,

The first and most essential condition of relief against a defect in the execution of a power is that there shall have been a clear intention on the part of the donee of the power to execute it (*t*).

and conformable to the intention of creator of the power.

Secondly, the granting of relief against a defective execution is always conditional upon the general rule that equity will not assist in defeating the intention of the person creating the power. It will not therefore dispense with any conditions imposed upon its execution which are not merely formal. Thus if the consent of any person is required, a power exercised without such consent will not be supported (*u*). And if a given time is prescribed within which the power must be exercised, this direction must be complied with (*x*). Still less will equity assist in setting up a defective execution which amounts to a breach of trust (*y*).

Defects of form relieved against.

The defects to which assistance of equity is afforded may be described generally as defects of form. The rule is that where an intention to execute the power is manifest, a mere non-compliance with prescribed forms will be remedied (*z*).

Substitution

Perhaps the most conspicuous illustration of the rule is

L. 52; *Dowell* v. *Dew*, 1 Y. & C. Ch. 345.

(*r*) 12 & 13 Vict. c. 26, 13 & 14 Vict. c. 17.

(*s*) *Roswell's case*, per Hutton, Ro. Abr. 379, fol. 6; *Anon.*, Freem. 224.

(*t*) *Garth* v. *Townsend*, 7 Eq. 220.

(*u*) *Lawrenson* v. *Butler*, 1 S. & L. 13.

(*x*) *Cooper* v. *Martin*, 3 Ch. 47.

(*y*) *Mortlock* v. *Buller*, 10 Ves. 292, 317.

(*z*) *Shannon* v. *Bradstreet*, 1 S. & L. 63; *Fothergill* v. *F.*, Freem. 256.

the case in which a power, directed to be exercised by deed only, is in fact executed by will. This is regarded as a merely formal variation, and is relieved against (*a*). But the converse case is different; a power directed to be exercised by will only cannot effectually be exercised by deed; for a deed being an irrevocable instrument, to allow it to be used instead of a will would be to depart in substance from the intention of the donor of the power (*b*). of a will for a deed.

Another large class of cases in which relief is afforded comprises those in which there has been an appointing instrument competent on the general principles of equity, but ineffectual at law; as where the donee of a power has covenanted or agreed to execute it (*c*), or has given a written promise to grant an estate, which he can only fulfil by the exercise of a power (*d*). A recital in a deed has been considered a sufficient indication of intention to amount to an equitable execution (*e*). Equitable appointment.

Other defects more formal still are *à fortiori* aided; for instance, the presence of less than the prescribed number of witnesses, or an omission to seal an instrument which the donor of the power has directed to be signed and sealed (*f*). But the Wills Act itself prevents any relief being given in case of non-compliance with its provisions (*g*). As to number of witnesses.

By 22 & 23 Vict. c. 35, s. 12, it is now provided that a deed executed in the presence of and attested by two or more witnesses, shall, so far as respects execution and attestation, be a valid execution of any power of appointment by deed, notwithstanding that the instrument creating the power shall have required some additional or other forms

(*a*) *Tollet* v. *T.*, 2 P. Wms. 489; *Sneed* v. *S.*, Amb. 64.

(*b*) *Reid* v. *Shergold*, 10 Ves. 370; *Adney* v. *Field*, Amb. 654.

(*c*) *Fothergill* v. *F.*, *sup.*; *Mortlock* v. *Buller*, *sup.*

(*d*) *Campbell* v. *Leach*, Amb. 740; *London Chartered Bank* v. *Lempriere*, L. R. 4 P. C. 572.

(*e*) *Wilson* v. *Piggott*, 2 Ves. jr. 351; *Cunynghame* v. *Anstruther*, L. R. 2 Sc. & D. 223.

(*f*) *Wade* v. *Paget*, 1 Bro. C. C. 363; *Morse* v. *Martin*, 34 Beav. 500.

(*g*) 1 Vict. c. 26, s. 10. But as to wills executed abroad, see *Hummel* v. *H.*, (1898) 1 Ch. 642; 67 L. J. Ch. 363; *Tomlin* v. *Latter*, (1900) 1 Ch. 442; 69 L. J. Ch. 225; *Barretts* v. *Young*, (1900) 2 Ch. 339; 69 L. J. Ch. 605.

of execution and attestation. This enactment covers many cases in which relief was formerly purely equitable.

Non-execution not relieved against.

It is clearly settled that the principle which supplies a defect in the execution of a power does not extend to a non-execution. Thus if a person has been prevented from effecting an execution or an attempted execution by any accident such as sudden illness or death, there is no jurisdiction whatever to take the property from those entitled in default of appointment (*h*). The only possible exception to this would be a case in which execution was prevented by fraud, the general rule being that equity considers that as done which has been fraudulently prevented from being done. But there does not seem to be any express decision on the point (*i*).

(iii.) **In whose favour equity will interfere.**

It has in many places been observed that equity will not interfere in favour of pure volunteers; and that principle applies here. It requires at least a meritorious consideration to support the claim of the person seeking relief.

Relief given to purchasers,

The strongest claim is that of a purchaser, which term includes a mortgagee and a lessee (*k*). Creditors are also entitled to relief (*l*), and charities, which are generally favoured in equity (*m*). In the leading case of *Tollet* v. *Tollet* (*n*) similar assistance was offered in favour of a wife; a legitimate child is in the same position (*o*); and in these cases it matters not that the claim is made upon a meritorious consideration only, as, for instance, upon a provision made after marriage (*p*); nor is the relief barred

creditors,

charities,

wife, child.

(*h*) *Tollet* v. *T.*, 2 P. Wms. 489; *Buckell* v. *Blenkhorn*, 5 Ha. 131, 141.

(*i*) See *Middleton* v. *M.*, 1 J. & W. 94.

(*k*) *Fothergill* v. *F.*, Freem. 256; *Taylor* v. *Wheeler*, 2 Vern. 564; *Campbell* v. *Leach*, Amb. 740.

(*l*) *Wilkes* v. *Holmes*, 9 Mod. 485.

(*m*) *Innes* v. *Sayer*, 7 Ha. 377.

(*n*) *Sup.*

(*o*) *Sneed* v. *S.*, Amb. 64.

(*p*) *Hervey* v. *H.*, 1 Atk. 567.

by the fact that the wife or child is otherwise provided for (*q*).

But in the absence of some natural or moral obligation on the part of the donee of the power to provide for the person in whose favour the defective execution has been made, no aid will be given (*r*). Thus a husband (*s*), a grandchild (*t*), and collateral relations (*u*) have no title to relief; and *à fortiori* a volunteer, even though he be the creator of the power himself (*x*), or the donee of the power (*y*).

No relief to husband, grandchild, collaterals. Volunteers.

The interference of equity is also subject to the further condition that it will not be afforded if the person entitled in default of appointment has a claim on the donee equal to that of the person who seeks to have the execution aided (*z*). In other words, as between equal claimants, equity will not interfere. This limitation is chiefly illustrated by cases in which a child has been entitled in default of appointment, and the effect of the appointment would be to leave him totally unprovided for (*a*).

Or against a person having an equal equity.

(*q*) *Hervey* v. *H.*, *sup.*; *Chapman* v. *Gibson*, 3 Bro. C. C. 229.
(*r*) Farwell, 341, ed. 2.
(*s*) *Moodie* v. *Reid*, 1 Madd. 516.
(*t*) *Tudor* v. *Anson*, 2 Ves. sr. 582.
(*u*) *Goodwyn* v. *G.*, 1 Ves. sr. 228.
(*x*) *Watts* v. *Bullas*, 1 P. Wms. 60, note; *Chetwynd* v. *Morgan*, 31 Ch. D. 596.
(*y*) *Ellison* v. *E.*, 6 Ves. 656.
(*z*) Farwell, 342, ed. 2.
(*a*) *Chapman* v. *Gibson*, *sup.*; *Morse* v. *Martin*, 34 Beav. 500.

Section II.—Accident.

Definition.
I. *Extent of remedy at Law.*
II. *Characteristics of remedy in Equity.*

Accident defined.

Accident, in the sense in which the word is used in Courts of equity, has been defined as comprising "*such* "*unforeseen events, misfortunes, losses, acts, or omissions, as* "*are not the result of any negligence or misconduct in the* "*party*" (*a*).

Distinguished from mistake.

The distinction between accident and mistake is manifest and important. Mistake has reference to a state of things at the time at which the contract or other transaction in question takes place. Accident refers to some event which occurs subsequently to the transaction. Mistake is essentially subjective; it indicates a mental condition of one or both of the parties concerned. Accident is objective; it relates to facts wholly external to the parties. Mistake affects the quality or character of the transaction itself. Accident introduces some modification in the remedy which would otherwise be available, or gives rise to some particular claim for relief.

Jurisdiction to relieve conditional on defect of legal remedy.

The jurisdiction of equity to grant relief in certain cases of accident is of very ancient date. In its inception it only extended to cases in which no adequate relief was attainable in a Court of law. From time to time Courts of law have acquired new powers of granting relief; but in this as in other branches of equity, the jurisdiction having once

(*a*) Story, 78.

arisen was never afterwards affected by the increased powers of the law. The study of equity, therefore, still requires an examination of the jurisdiction as formerly contrasted with that of common law.

I. *Remedy at Law.*

Extent of remedy at law.

In the inquiry, then, whether in any particular case of accident equity had jurisdiction to grant relief, the first question was whether there was an adequate remedy at law. To answer this a brief *résumé* of the legal jurisdiction in cases of accident is required.

Vis major.

1. Courts of law have always recognised the plea of "*vis major*," or "the act of God." These terms are not indeed to be understood in a wide sense; but only as including "events which *as between the parties*, and *for the purpose of* "*the matter in hand*, cannot be definitely foreseen or con- "trolled" (*b*).

Destruction of subject-matter of contract, or non-existence thereof.

Thus where the performance of a contract depends on the existence of a specific thing, and by the accidental destruction of that thing performance becomes impossible, the contract is no longer enforceable at law (*c*). The law in such a case implies a condition that the contract shall be off if a thing necessary to its performance perishes without default of the contractor.

Similarly a contract for a future specific product is deemed at law to be conditional on such product eventually coming into existence. For instance, a contract to deliver 200 tons of a particular crop of potatoes was held to be *pro tanto* discharged by a failure of the crop to reach that amount (*d*).

(*b*) Pollock, Contr. 397, ed. 6.
(*c*) *Taylor* v. *Caldwell*, 3 B. & S. 826.
(*d*) *Howell* v. *Coupland*, L. R. 9 Q. B. 462; 1 Q. B. D. 258.

Personal service.

Thus again, a contract for personal service is deemed to be conditioned upon the continuance of the life and health of the contracting party (*e*).

Warranty and covenant distinguished.

It scarcely need be said that these principles have no application where there is a warranty or express covenant against the loss or destruction of the thing in question. In such cases the destruction being evidently contemplated and expressly provided for, does not fall within the definition of an accident; and we shall observe that in this respect there is no distinction between equity and law.

Loss and destruction of deeds.

Bonds.

2. In many cases the loss or destruction of deeds was remediable at law, evidence being admitted of the loss or destruction and of the contents (*f*). But in the case of bonds the legal remedy was long inadequate, owing to the technical rule that the defendant was entitled to demand that it should be read in open Court: in other words, *profert* and *oyer* of the bond were necessary to its enforcement. Hence an equitable jurisdiction to grant relief in such cases arose, which, as usual, has not been displaced by the amendment of the law in the same direction (*g*).

Bills, notes.

3. A bill or note which was not negotiable might, it seems, notwithstanding its loss or destruction, have been proved and sued upon at law (*h*); but an acceptor of a negotiable bill or note could not have been compelled to pay it to any one who could not deliver it up (*i*). By 17 & 18 Vict. c. 125, s. 87, it is, however, enacted that "in any action founded upon a bill of exchange or other "negotiable instrument, it shall be lawful for the Court or "a judge to order that the loss of such instrument shall "not be set up, provided an indemnity is given to the

17 & 18 Vict. c. 125.

(*e*) *Farrow* v. *Wilson*, L. R. 4 C. P. 744; *Boast* v. *Firth*, *ibid.* 1.

(*f*) *Whitfield* v. *Fausset*, 1 Ves. sr. 387, 392.

(*g*) C. L. Proc. Act, 1852 (15 & 16 Vict. c. 76), s. 55; and see now as to lost scrip, 55 & 56 Vict. c. 39, s. 7.

(*h*) *Charnley* v. *Grundy*, 14 C. B. 608, 614; *Wain* v. *Bailey*, 10 Ad. & E. 616.

(*i*) *Hansard* v. *Robinson*, 7 B. & C. 90; *Ramuz* v. *Crowe*, 1 Ex. 167.

"satisfaction of the Court or judge, or a master, against "the claims of any other person upon such negotiable "instrument" (*k*). But this extension of the legal remedy did not, of course, affect the equitable jurisdiction which had before arisen.

II. *Remedy in Equity.*

These few illustrations will perhaps suffice to indicate, as far as our present purpose requires, the extent and character of the legal jurisdiction to grant relief in cases of accident. From them we may ascertain whether or not the first condition of equitable relief, namely, the inadequacy of the legal remedy, is complied with.

Second condition is conscientious title to relief.

There is a second condition, equally important; namely, that the party seeking relief must show a conscientious title thereto.

Effect of negligence or misconduct.

Equities equal.

If, therefore, the party seeking relief has been guilty of gross negligence, or of other misconduct in the transaction, he cannot successfully appeal to equity (*l*). Or if both parties stand upon an equal footing in equity, in accordance with the common maxim, equity will not interfere with their legal position. Thus no relief will be given against an heir-at-law where accident has prevented the making of a will, or the will has been imperfect (*m*). And, generally, against a *bonâ fide* purchaser for value without notice, a Court of equity will not interfere on the ground of accident (*n*).

Matters of positive contract.

On similar grounds equity will not relieve against accident in matters of positive contract, where the possi-

(*k*) And see now 45 & 46 Vict. c. 61, ss. 69, 70.

(*l*) *Exp. Greenway*, 6 Ves. 812.

(*m*) *Whitton* v. *Russell*, 1 Atk. 448; 1 Mad. 46; Story, 106.

(*n*) *Malden* v. *Merrill*, 2 Atk. 8; Story, 108.

bility of the accident may fairly be considered to have been within the contemplation of the contracting parties. Thus a lessee who covenants to pay rent, or to keep the demised premises in repair during a given term, will remain bound by his covenants as well in equity as at law, notwithstanding an accidental destruction of the premises; for such express contracts indicate an intention to secure the lessor against the consequences of accident; or at least it may be said that the lessee has been guilty of negligence in not protecting himself, by requiring exceptions from the general liability which he has deliberately undertaken (*o*), or by insurance.

Bearing in mind these two leading principles on which the equitable jurisdiction in matters of accident rests, we are now prepared to notice in greater detail some particular instances of its application.

1. We have already briefly observed the nature and limits of the jurisdiction of Courts of law in the case of lost deeds and other instruments. We shall now investigate that of equity as dealing with the same class of cases.

Relief in equity on lost bonds.

Equitable interposition is very common and very beneficial in the case of lost bonds. Not only was there claim to relief on the ground that originally the Courts of law refused to dispense with the *profert* and *oyer* of the bond, but there was the further ground that Courts of equity alone had the power of imposing just conditions on the party seeking relief. The maxim, "He who seeks equity "must do equity," is conspicuously applicable to such cases; and equity gives effect to it by requiring a plaintiff who seeks to enforce a bond while alleging its loss, to give a suitable bond of indemnity (*p*). The procedure of

Indemnity.

Proof of loss on oath.

(*o*) *Bullock* v. *Dommitt*, 6 T. R. 650; *Pym* v. *Blackburn*, 3 Ves. 34, 38; Story, 101.

(*p*) *Exp. Greenway*, 6 Ves. 812; *E. I. Company* v. *Boddam*, 9 Ves. 464.

equity also had the advantage of enabling it to require the plaintiff to maintain the fact of the alleged loss by affidavit (*q*).

Former distinction between suit for discovery and for relief.

There was formerly a distinction between the position of a plaintiff merely seeking discovery and that of one who at the same time asked for relief. Where the plaintiff asked only for discovery equity would make a decree without any affidavit of loss or offer of indemnity (*r*), the ground of the distinction being that in suits for discovery the interference of equity was merely auxiliary, and did not interfere at all with the original jurisdiction of the Courts of law. Under the present procedure, however, the reason of the distinction has disappeared, and now in any case an affidavit is required (*s*).

Lost title deeds.

2. Another illustration of the superiority of the relief afforded by equity is supplied by those cases in which a title deed of land has been destroyed or concealed, and the suffering party does not know which alternative is correct. In such a case equity can decree possession of the land to the plaintiff until the defendant shall either produce the deed or admit its destruction (*t*). Courts of law having had no power to put a defendant upon such terms, could afford no adequate relief in such a case. On similar principles a plaintiff in possession might have had his possession established under a lost deed in a suit for discovery (*u*).

Lost negotiable instruments.

3. In the case of lost negotiable instruments, as in that of lost bonds, a Court of equity was the proper forum in which to seek relief, because of its power to provide for an adequate indemnity to protect the defendant (*x*).

Non-negotiable instruments.

In the case of a non-negotiable instrument, whatever doubt there may be as to the former jurisdiction at law to

(*q*) *Exp. Greenway, sup.*

(*r*) *Dormer* v. *Fortescue*, 3 Atk. 132; *Walmsley* v. *Child*, 1 Ves. sr. 344.

(*s*) Jud. Act, 1873, Order XXXI.

(*t*) *Whitfield* v. *Fausset*, 1 Ves. sr. 392.

(*u*) *Dormer* v. *Fortescue, sup.*

(*x*) *Hansard* v. *Robinson*, 7 B. & C. 90; *Glynn* v. *B. of England*, 2 *ib.* 38.

entertain a suit thereon, such an instrument having been assignable in equity, an indemnity might be reasonably demanded, and hence there is clearly an equitable jurisdiction to grant relief.

Contracts of personal service.

4. We have observed that contracts of personal service were at law deemed to be conditioned on the life and health of the contracting parties. In equity this principle is carried further. Thus where an apprentice paid a premium in consideration of receiving instruction for a certain time, and before the expiration thereof the master became bankrupt, equity apportioned the premium and decreed repayment of that for which, owing to the bankruptcy, the consideration had failed (*y*). This principle has since been embodied in the Bankruptcy Act (*z*).

Payments by executors, &c.

5. Other cases of accident fall still more peculiarly within the cognisance of Courts of equity. Thus if an executor or administrator pays the debts and legacies of his testator or intestate in full, in confidence that the assets

and accidental loss of testator's property.

are sufficient, but it is eventually found that from some accident or unforeseen occurrence they are deficient, equity alone can relieve; and it will do so where the deficiency has resulted from an innocent accident or mistake (*a*).

Instances of this kind are supplied by cases in which the goods of the testator have been stolen without any negligence on the part of his executor (*b*), or have been destroyed, or damaged by fire, or otherwise (*c*); and also by cases in which an executor has reckoned as an asset a debt which he supposed to be still due, but which proves in fact to have been paid to the testator (*d*). Equity will not, however, protect executors who make payments on a wrong principle of law. If they take it upon themselves to con-

(*y*) *Hale* v. *Webb*, 2 Bro. C. C. 78.
(*z*) See 46 & 47 Vict. c. 52, s. 41, *inf.*, p. 550.
(*a*) *Edwards* v. *Freeman*, 2 P. Wms. 447; *Hawkins* v. *Day*, Amb. 160.
(*b*) *Jones* v. *Lewis*, 2 Ves. sr. 240.
(*c*) *Clough* v. *Bond*, 3 My. & Cr. 490, 496; *Job* v. *J.*, 6 Ch. D. 562.
(*d*) *Pooley* v. *Ray*, 1 P. Wms. 355.

strue an obscure will, for instance, they do so at their peril (*e*).

6. If, again, an annuity given by a will is secured by public stock which is afterwards reduced by Parliament (*f*), or becomes unproductive owing to a revolution (*g*), equity will grant relief as against the residuary legatees on the ground of accident. Annuities accidentally reduced.

(*e*) *Hilliard* v. *Fulford*, 4 Ch. D. 389.

(*f*) *Davies* v. *Wattier*, 1 S. & S. 463; 51 Vict. c. 2.

(*g*) *Hatchett* v. *Pattle*, 6 Madd. 4.

CHAPTER IV.

RELIEF AGAINST PENALTIES AND FORFEITURES.

Principle of granting relief.

I. *Relief when given.*

II. *Limits of the principle.*

RELIEF against penalties and forfeitures was originally obtainable exclusively in equity, and this having been so, its jurisdiction remains, notwithstanding that its principles have from time to time been embodied in statutes, and thus become operative in Courts of Common Law; and whatever distinctions between the two jurisdictions continued up to the passing of the Judicature Act, 1873, have by that statute been rendered unimportant.

Peachy v. *D. of Somerset.*

There are two leading authorities on the doctrine of relief against penalties and forfeitures. In *Peachy* v. *The Duke of Somerset* (*a*), a person having incurred a forfeiture of a copyhold by making leases contrary to the custom of the manor, and by felling timber, digging stones, and grubbing up hedges, although he offered by his bill to make a recompense, was held not entitled to relief in equity. It was expressed that the true ground of relief against penalties was from the original intent of the case; if the penalty was designed only to secure money, then on pecuniary recompense being given the Court would grant

(*a*) 1 Strange, 447; 2 W. & T. L. C. 1100.

relief. But in *Sloman* v. *Walter* (*b*), a somewhat wider view was taken; and the rule was laid down that "where "a penalty is inserted merely to secure the enjoyment of "a collateral object, the enjoyment of the object is con- "sidered as the principal intent of the deed, and the "penalty only as occasional, and therefore only to secure "the damage really incurred." So that whenever this is the case, even though the object of the penalty may be something more than to secure a payment of money, equity is wont to decree compensation in lieu thereof, to the extent of the damage really sustained. *Sloman* v. *Walter*.

The test question therefore becomes, whether compensation can effectually be made. Penalties to secure payments of money are doubtless the simplest cases, since in them payment with interest is a complete compensation. But there are other cases in which damages for a non-compliance with a condition to perform some collateral act may be assessed with sufficient accuracy to render compensation equitable, and thus to avoid the extreme consequences of forfeiture. Relief not now confined to penalties to secure money payments.

We shall first illustrate the operation of the principle by referring to those classes of cases in which it is most frequently applied; and secondly, shall indicate the limits of the principle by referring to certain cases in which it has not been considered applicable.

I. *Relief, when given.*

1. Among the most frequent cases in which in the early times of English equity this jurisdiction was exercised, were the cases of common bonds, in which the payment of a given sum and interest was secured by a conditional Bonds.

(*b*) 1 Bro. C. C. 418; 2 W. & T. L. C. 1112.

penalty of double the amount, or some other excessive sum. Relief in such cases was continually given in equity on the terms of paying the principal, interest, and costs, until the statutes 8 & 9 Will. III. c. 11, and 4 & 5 Anne, c. 16, rendered applications to equity for this purpose no longer necessary.

8 & 9 Will. III. c. 11; 4 & 5 Anne, c. 16.

Covenants to pay.

The same principle naturally applies where a penalty is inserted in any deed to secure a payment of money, for instance, purchase-money (*c*). And relief in cases of this description is now provided for by the Common Law Procedure Act, 1860 (*d*), which permits payment into Court to be pleaded by leave of the Court or a judge in any action on any bond which has a condition to make void the same upon payment of a lesser sum at a day or place certain (*e*).

C. L. P. Act, 1860.

Interest in mortgages.

2. Relief is, as we shall elsewhere observe, also given when the penalty takes the form of requiring a higher rate of interest in case the principal or interest of a mortgage debt shall not be paid at the stated time or times (*f*); but if the agreement is that on condition of punctual payment a lower rate of interest shall be payable, then on breach of this condition the higher rate may be insisted on, and there is no equity to interfere with the claim (*g*). The cases where, in the happening of a certain event, it is independently agreed that a higher rate of interest is to be paid are distinguishable (*h*).

In short, it may be regarded as a principle of universal application that where the payment of a smaller sum is secured by a larger, the larger sum will be regarded as a penalty, the enforcement of which will be relieved against (*i*).

(*c*) *Exp. Hulse*, 8 Ch. 1022.
(*d*) 23 & 24 Vict. c. 126.
(*e*) S. 25.
(*f*) *Stanhope* v. *Manners*, 2 Ed. 199, *inf.*, p. 257.
(*g*) *Nicholls* v. *Maynard*, 3 Atk. 519.
(*h*) *General Credit, &c. Co.* v. *Glegg*, 22 Ch. D. 549; 52 L. J. Ch. 297; *Herbert* v. *Salisbury, &c. Rail. Co.*, 2 Eq. 221.
(*i*) *Astley* v. *Weldon*, 2 B. & P.

Forfeiture for non-payment of rent.

3. Where in a lease there was a clause of forfeiture for non-payment of rent at a stated time, equity always held that the right of entry was only intended as a security for the rent, and continually relieved against it on the lessee's paying the arrears of rent accrued due with interest thereon. This principle has long been recognised by statute, but its application has been thereby limited to cases in which relief is sought within six months after execution (*k*).

Mortgages.

4. Similarly, relief is continually given against the forfeiture of a mortgaged estate by default of payment at the time named in the deed; the mortgagor having nevertheless an equity to redeem on payment of the principal, interest and costs.

Penalties to secure collateral acts.

5. The case of *Sloman* v. *Walter* (*l*) affords another illustration of relief against a pecuniary penalty to secure a collateral act. There the condition of the penalty was that the defendant should have the use of a particular room in a house whenever he thought proper; on his seeking to recover the penalty, he was restrained by injunction on the bill of the plaintiff, pending the decision of an issue to ascertain the actual amount of damage sustained. In a similar case, a bond with a penalty of £600 not to carry on business save as therein specified within a given area, was relieved against, and actual damages only awarded (*m*).

Covenants to insure.

6. Apart from legislation, Courts of equity had no power to relieve against forfeiture for breach of a covenant to insure, on the ground that the risk occasioned was of such a nature as to be incapable of estimation in damages (*n*). But owing to the hardship often occasioned

350—355; *Re Newman*, 4 Ch. D. 724.

(*k*) 4 Geo. II. c. 28; 15 & 16 Vict. c. 76, ss. 210, 211; 30 & 31 Vict. c. 59.

(*l*) *Sup.* p. 241.

(*m*) *Hardy* v. *Martin*, 1 Bro. C.C. 419, n.

(*n*) *Green* v. *Bridges*, 4 Sim. 96.

22 & 23 Vict. c. 35, s. 4. 23 & 24 Vict. c. 126.

by the strict interpretation of such covenants, statutory powers of relief were given, first by 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 126; which enactments have been since replaced by the more comprehensive measure presently referred to (*o*).

One sum securing several acts, when regarded as penalty.

7. Where a sum of money is stated to be payable upon breach of all or any or one of a number of stipulations, and it is evident that some of them involve serious damage, while others are of trifling importance, then it will be presumed that the parties intended the sum to be subject to modification, and the contract will be treated as giving rise to a claim for damages only (*p*). This is most obviously the case when one of the stipulations is for the payment of a sum of money of less amount than the penal sum named.

Kemble v. *Farren*.

Such a case is well illustrated by *Kemble* v. *Farren* (*q*), where the contract was that the defendant should act at Covent Garden Theatre for four seasons receiving £3 6*s*. 8*d*. for every night the theatre was open. There was a proviso that if *either party* should neglect or refuse to fulfil the said agreement or any part thereof, such party should pay to the other the sum of £1,000, and it was agreed that this sum should be considered as liquidated damages, and not as in the nature of a penalty. Nevertheless, on a breach of the agreement in the second season, the Court held that this sum was a penalty, since there was no attempt at proportioning it to the extent of the breach.

It will be seen from the cases that though the Court will by no means disregard the expressed intention of the parties, it is not bound by the mere fact that they have formally agreed that the sum named shall be considered as liquidated damages at all events, and not as a penalty.

The case of *Kemble* v. *Farren* has indeed often been cited as establishing the wider proposition, that where a

(*o*) *Inf.* p. 249.
(*p*) *Elphinstone* v. *Monkland Iron, &c. Co.*, 11 App. Cas. 332.
(*q*) 6 Bing. 141; *Astley* v. *Weldon*, 2 B. & P. 346.

contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, this must be considered as a penalty, and this without qualification as to the nature of the stipulations themselves (*r*). It has indeed been held that such is the presumption (*s*), but each case is to be determined according to the particular facts involved and terms used, and as is seen by the judgments of all the judges of the Court of Appeal in *Wallis* v. *Smith* (*t*), the tendency of the Court is now not to interfere with any clearly expressed intention of the parties. *Wallis* v. *Smith.*

8. Another illustration is afforded by those cases in which the Courts have refused to enforce a bye-law of a railway company to the effect that a passenger who travels without a ticket beyond the distance for which his ticket is issued must pay the whole fare from the place from which the train started (*u*). The principle resembles that of *Kemble* v. *Farren* (*x*), it being considered that the same sum cannot be reasonably demanded as damages for breaches of contract differing in degree. The cases, however, in which specially reduced fares are charged for particular stations, on the condition that the tickets are only available for those stations, are distinguishable, the remedy in such cases being dependent on contract, and not in the nature of a penalty or forfeiture (*y*).

9. In cases in which relief might not otherwise have been given, if there have been any unavoidable accident, surprise, excusable ignorance, or fraud, which has prevented Accident, surprise, or fraud.

(*r*) See *dicta* of Lord Coleridge, C. J., in *Magee* v. *Lavell*, L. R. 9 C. P. 107, 111, and James, L. J., in *Re Newman*, 4 Ch. D. 724, 731.

(*s*) *Elphinstone* v. *Monkland Iron Co.*, *sup.*

(*t*) 21 Ch. D. 243, 264, 271, 276; 52 L. J. Ch. 145; and see *Law* v. *Local Board of Redditch*, (1892) 1 Q. B. 127; 61 L. J. Q. B. 172.

(*u*) *Brown* v. *G. E. R. Co.*, 2 Q. B. D. 406.

(*x*) *Sup.*

(*y*) *G. N. R.* v. *Winder*, (1892) 2 Q. B. 595; 61 L. J. Q. B. 608; *G. N. R.* v. *Palmer*, (1895) 1 Q. B. 862; 64 L. J. Q. B. 316.

the execution of a covenant, the Court will interfere upon compensation being made (*z*). Under such circumstances as these, relief has been given against a forfeiture of a breach of a covenant to repair (*a*); and similarly where the act of forfeiture has been committed in reliance on the assurances of an agent of the defendant (*b*), and where the right to claim forfeiture has been waived (*c*).

II. *Limits of the Principle.*

Compensation must be ascertainable.

1. It being a condition of granting relief against a penalty or forfeiture that proper compensation for the breach of the agreement shall be made, it follows that where there are no means of ascertaining what amount of compensation would be equitable, no relief will be given.

Covenant to repair;

Thus in the case of a breach of a general covenant to repair, by which a forfeiture has been incurred, equity has hitherto usually refused to interfere (*d*). The case of a covenant not in general terms, but to lay out a specific sum in a given time, was sometimes distinguished (*e*); but it seems that even in such cases relief was only given under

to build, &c.

special circumstances (*f*). On similar grounds relief was refused in case of a breach of a covenant to build houses (*g*); and of a covenant to cultivate land in a husbandlike manner (*h*). All these cases are, however, now provided for by statute (see p. 249), and relief in accordance with its terms may be given notwithstanding

(*z*) *Eaton* v. *Lyon*, 3 Ves. 690, 693; *Hill* v. *Barclay*, 18 Ves. 56, 62.

(*a*) *Hughes* v. *Met. R. Co.*, 1 C. P. D. 120; 2 App. Cas. 439.

(*b*) *Wing* v. *Harvey*, 5 De G. M. & G. 265.

(*c*) *Croft* v. *Lumley*, 5 E. & B. 648.

(*d*) *Gregory* v. *Wilson*, 9 Ha. 683, 689.

(*e*) *Hack* v. *Leonard*, 9 Mod. 9.

(*f*) *Hill* v. *Barclay*, *sup.*; *Brace-bridge* v. *Buckley*, 2 Price, 200, 215.

(*g*) *Croft* v. *Goldsmid*, 24 Beav. 312.

(*h*) *Hills* v. *Rowland*, 4 De G. M. & G. 430.

the breach of any covenant, excepting those therein expressly excepted.

Forfeiture of shares for non-payment of calls.

2. It is a common stipulation in public undertakings that shareholders shall forfeit their shares on non-payment of calls. It might at first sight seem that this presented a reasonable case for relief on payment of the arrears with interest; but equity has, on grounds of public policy, refused to interfere in these cases (*i*). What distinguishes them from the case of a lessee who allows his rent to fall into arrear, is that in the former case the undertaking is usually of a more or less speculative character, and it would be inequitable to allow a shareholder to lie by and withhold his calls indefinitely until the chances of success were fully ascertained. The danger of a multiplicity of actions arising in case relief was so afforded has also been of weight in the decisions. Where, however, in the articles of association of a public company there is no stipulation or clause conferring upon directors a power to declare shares forfeited, they have no implied power to do so (*k*). And wherever such a power of forfeiture is provided, it will be strictly construed, and every condition prescribed for its exercise must be complied with (*l*).

Forfeiture of deposit on sales.

It is a common term in contracts for the sale of land that the purchaser shall pay a certain sum as a deposit, and that if the purchaser does not complete the purchase and pay the balance of the purchase-money on the day named, the vendor shall be at liberty to re-sell and recover any deficiency in price as liquidated damages. Under such a contract the Court will not relieve the purchaser from the forfeiture of the deposit if he fails to complete *within a reasonable time* (*m*). But in order to entitle the vendor to retain the deposit there must be acts

(*i*) *Sparks* v. *Liverpool Waterworks*, 13 Ves. 428.

(*k*) *Re National, &c. Co.*, 7 W. R. 379; *Clarke* v. *Hart*, 6 H. L. 633.

(*l*) *Ibid.*; *Bottomley's Case*, 16 Ch. D. 681; 50 L. J. Ch. 167.

(*m*) *Howe* v. *Smith*, 27 Ch. D. 89; *Soper* v. *Arnold*, 35 *ib.* 384; 37 *ib.* 96; 14 App. Cas. 429; 59 L. J. Ch. 214; *Exp. Barrell*, 10 Ch. 512.

on the part of the purchaser which amount to a repudiation of the contract (*n*).

Statutory penalties.

3. The Court has no jurisdiction to grant relief against any penalties imposed by statute (*o*). Within this principle fall penalties imposed by benefit building societies in accordance with their rules under 6 & 7 Will. IV. c. 92 (*p*).

Persons may not elect between an agreement and a penalty.

4. Though in many cases, as above shown, equity relieves against a penalty or forfeiture which has been incurred by a breach of contract, it will not suffer a person who has entered into an agreement to escape the obligation of specifically performing it by electing to pay the penalty stipulated in case of non-performance. The case of *French* v. *Macale* (*q*) is usually referred to on this question. There it was laid down by Lord St. Leonards that "if a "thing be agreed upon to be done, though there is a "penalty annexed to its performance, yet the very thing "must be done"; and the rule applies whether the contract be to do or to abstain from doing anything (*r*).

French v. *Macale*.

Contracts varying on certain conditions.

But care must be taken to distinguish between such cases and those in which a certain sum is agreed to be paid as the price of or consideration for doing or abstaining from doing a given act—for instance, where a lessee covenants to reside on the premises or not to plough land, and if otherwise to pay an additional rent. Here the additional rent will not, on the one hand, be regarded as a penalty, so as to be relieved against, nor on the other hand can the lessee be restrained from exercising the option given to him (*s*). Where the contract is of this nature, the Court will not infer from the fact of the additional sum reserved being disproportioned to the actual damage

(*n*) See and distinguish *Palmer* v. *Temple*, 9 Ad. & E. 508.

(*o*) *Keating* v. *Sparrow*, 1 Ba. & Be. 367; *Re Brain*, 18 Eq. 389.

(*p*) *Parker* v. *Butcher*, 3 Eq. 762; *Provident P. B. Soc.* v. *Greenhill*, 9 Ch. D. 122.

(*q*) 2 Dr. & W. 269.

(*r*) *Ibid.*; *Fox* v. *Scard*, 33 Beav. 327; *National Provincial Bank* v. *Marshall*, 40 Ch. D. 112; 58 L. J. Ch. 229.

(*s*) *Rolfe* v. *Peterson*, 2 Bro. P. C. 436; *Hardy* v. *Martin*, 1 Cox, 27.

resulting that it is in the nature of a penalty (*t*); but if together with a covenant for additional payment there is also a clause of forfeiture, the payment will then, it seems, be deemed a penalty (*u*).

Liquidated damages.

5. The cases last discussed illustrate the distinction between a penalty and liquidated damages, on which distinction the whole of the present question turns. It has already been seen that the mere use of the term "liquidated damages," or even an express agreement that a sum shall be considered as such, is not conclusive as to its character. The Court will look at the whole transaction in order to determine whether the payment provided for is rightly to be regarded as a penalty or not (*x*); and in doing so, the Court will seek to give effect to the clearly expressed intention of the parties, and not to overrule their agreements on the ground "that judges know the business of "the people better than they know it themselves" (*y*).

Conveyancing Acts, 1881 and 1892.

6. By the Conveyancing Acts, 1881 and 1892 (*z*), the powers of the Court to relieve against the forfeiture of leases has been largely increased. By the former Act it is enacted that a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition therein, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of (*a*), and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring

(*t*) *Chilliner* v. *C.*, 2 Ves. sr. 528.

(*u*) *French* v. *Macale, sup.*; and see *Willson* v. *Love*, (1896) 1 Q. B. 626; 65 L. J. Q. B. 474.

(*x*) *Dimech* v. *Corlett*, 12 Moo. P. C. 199; *Jones* v. *Green*, 3 Y. & J. 298, 304.

(*y*) *Per* Jessel, M. R., in *Wallis* v. *Smith*, 21 Ch. D. 243; 52 L. J. Ch. 145; *Elphinstone* v. *Monkland Iron Co.*, 11 App. C. 332.

(*z*) 44 & 45 Vict. c. 41, s. 14; 55 & 56 Vict. c. 13.

(*a*) *Fletcher* v. *Nokes*, (1897) 1 Ch. 271; 66 L. J. Ch. 177; *Lock* v. *Pearce*, (1893) 2 Ch. 271; 62 L. J. Ch. 582.

the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach (if capable of remedy), and to make reasonable compensation in money, to the satisfaction of the lessor. Where the lessor is proceeding by action or otherwise to enforce such right of re-entry or forfeiture, the lessee may apply to the Court for relief, which the Court may grant or refuse on such terms as it may think fit. The statute expressly excepts from its operation covenants or conditions against assigning, underletting (*b*), or parting with the possession, or disposing of the land leased, a covenant for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest (*c*), and also covenants or conditions in mining leases to allow the lessor to inspect the mine or its books, &c., and it does not affect the law relating to re-entry or forfeiture or relief for non-payment of rent (*d*). It relates to existing as well as to future leases, and repeals 22 & 23 Vict. c. 35, ss. 4—9, and 23 & 24 Vict. c. 126, s. 2. By the Act of 1892 it is provided that a forfeiture on bankruptcy or execution may be relieved against, but only after the expiration of a year from the date of the bankruptcy or execution; and this section does not apply to leases of agricultural land, mines, public-houses, furnished dwelling-houses, or property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property. And the Court is empowered to protect under-lessees, on terms, on the forfeiture of superior leases. The conditions and terms on which the Court grants or refuses relief under

(*b*) *Barrow* v. *Isaacs*, (1891) 1 Q. B. 417; 60 L. J. Q. B. 179; *Eastern Telegraph* v. *Dent*, (1899) 1 Q. B. 835; 68 L. J. Q. B. 564; *Gentle* v. *Faulkner*, (1900) 2 Q. B. 267; 69 L. J. Q. B. 777.

(*c*) *Horsey Est.* v. *Steiger*, (1899) 2 Q. B. 79; 68 L. J. Q. B. 743; *Smith* v. *Gronow*, (1891) 2 Q. B. 394; 60 L. J. Q. B. 776; *Ewart* v. *Fryer*, (1901) 1 Ch. 499; 70 L. J. Ch. 138.

(*d*) *Scott* v. *Matthew Brown & Co.*, 51 L. T. 746.

these statutes are illustrated by many decisions, the most important of which, in addition to those already referred to, are cited below (*e*).

(*e*) *Imray* v. *Oakshette*, (1897) 2 Q. B. 218; 66 L. J. Q. B. 544; *Hind* v. *Nineteenth Century Building Soc.*, (1894) 2 Q. B. 226; 63 L. J. Q. B. 636; *Cholmeley's School* v. *Sewell*, (1894) 2 Q. B. 906; 63 L. J. Q. B. 820; *Howard* v. *Fanshawe*, (1895) 2 Ch. 581; 64 L. J. Ch. 666; *Re Serle*, (1898) 1 Ch. 652; 67 L. J. Ch. 344; *Pannell* v. *City Brewery Co.*, (1900) 1 Ch. 496; 69 L. J. Ch. 244.

CHAPTER V.

MORTGAGES AND LIENS.

SECTION I.—MORTGAGES AT LAW AND IN EQUITY.

I. *Mortgages at Common Law.*
II. *The Equity of Redemption.*
III. *Assignment of Mortgages.*
IV. *Persons entitled to Redeem.*
V. *Time of Redemption.*
VI. *Mortgages of a Wife's Property.*
VII. *Mortgages of Personalty.—Bills of Sale.*

I. *Mortgages at Common Law.*

Vivum vadium.

1. THE common law recognised two kinds of landed security, *vivum vadium* and *mortuum vadium.* The *vivum vadium* consisted of a feoffment to the creditor and his heirs until out of the rents and profits he had satisfied himself his debt. The creditor took possession, received the rents, and applied them in liquidation of the debt. When it was satisfied the debtor might re-enter and maintain ejectment. It seems to have been called *vivum vadium* because neither debt nor estate was lost.

Mortuum vadium.

2. The *mortuum vadium* was a feoffment to the creditor and his heirs to be held until the debtor paid his debt, until which time the creditor received the rents without account. The estate was unprofitable or *dead* to the mortgagor in the meantime, the original debt remaining un-

diminished. As in the *vivum vadium*, so in this security, the estate was never lost to the debtor.

3. Both these securities have long been obsolete, but there still exists a form of security which somewhat resembles each of them, namely, the Welsh mortgage. This consists of a conveyance of an estate to the creditor and his heirs to be held until the debt is discharged, the creditor meanwhile receiving the rents and profits as an equivalent for interest, while the principal remains undiminished. No covenant for the payment of the debt is inserted in the mortgage-deed, and the mortgagee has no power to compel redemption or foreclosure, though the mortgagor may redeem at any time (*a*). The Statute of Limitations (*b*) would probably bar the right of redemption at the expiration of twelve years from the *satisfaction of the debt*, but would not commence to run until then, the possession being up to that point not adverse (*c*). Welsh mortgage.

4. In the place of the ancient contracts of *vivum vadium* and *mortuum vadium* arose the modern mortgage, which is thus described by Littleton (*d*): "If a feoffment be "made upon such condition that if the feoffor pay to the "feoffee at a certain day, &c., forty pounds of money, then "the feoffor may re-enter; in this case the feoffee is called "tenant in mortgage. . . . If the feoffor doth not pay, "then the land, which is put in pledge upon condition for "the payment of the money, is taken from him for ever ". . . . and if he doth pay the money, then the pledge is "dead as to the tenant, &c." The modern mortgage.

The mortgage was thus an estate upon condition; a conveyance was made to the creditor with a condition in the deed, or in a deed of defeazance executed at the same time, by which it was provided that on payment by the mortgagor of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately, the How regarded at law.

(*a*) *Howell* v. *Price*, Prec. Ch. 423.
(*b*) 37 & 38 Vict. c. 57.
(*c*) Coote, p. 357, ed. 5.
(*d*) S. 332.

mortgagee became the legal owner of the land, and in him the legal estate vested, subject to the condition. If the condition was performed the mortgagor re-entered, and was in possession of his old estate. If the condition was broken, the mortgagee's estate became absolute and indefeasible.

Conditions required to be strictly performed.

The common law generally required strict performance of conditions; and with respect to conditions in mortgages, the rules on which it acted were, if not so rigid as were observed in some cases, nevertheless sufficiently so to work great hardship on mortgagors. There were unbending requirements as to the time and manner of payment, any neglect of which resulted in the irremediable loss of the estate, however much it might exceed in value the sum advanced.

II. *The Equity of Redemption.*

General principle;

1. It is evident that the above stated principles of common law are repugnant to the general doctrines of Courts of equity, according to which unreasonable penalties ought always to be relieved against. In the jurisprudence of the prætors at Rome, it had been established that where property was pledged for a debt, the debtor might redeem the estate on payment of the debt at any time before the passing of a judicial sentence confirming the creditor in his estate. The Court of Chancery could not, indeed, alter the legal effect of the forfeiture at law; it could not deprive the conveyance of its legal effect; but it brought the Roman principle into operation by another means.

how established.

Acting *in personam* on the conscience of the mortgagee, equity declared it unreasonable that he should retain for his own benefit what was intended merely as a pledge, and it adjudged that the mortgagor had an "equity to redeem" the estate on payment within a reasonable time

of the principal debt with proper interest and costs, notwithstanding the forfeiture at law (*e*). Thus was established, without direct interference with legal doctrines, the right known as the equity of redemption. So beneficial was this equitable interference found to be, and so tenaciously did the Courts of law still adhere to their rigid system, that mortgages soon fell almost entirely within the jurisdiction of the Court of Chancery, and have so continued to the present time. Now, by s. 34, sub-s. 3, of the Judicature Act, 1873 (*f*), the redemption and foreclosure of mortgages are expressly assigned to the Chancery Division of the High Court of Justice.

Mortgages fell within jurisdiction of equity.

2. No sooner, however, was the equity of redemption established, than another bold decision was required to confirm the principle in its utility. It was found that creditors, eager to regain the unjust advantage which the law had afforded them, attempted to evade the fairer doctrine of equity by requiring their debtors expressly to preclude themselves by agreement from their right to redeem. Fortified by this express stipulation, they sought to rely on the maxim *modus et conventio vincunt legem*, and to assert this in opposition to the interference of equity. But the firmness of the Courts of equity prevented this result. Always looking "*at the intent rather than at the form*" of things, these Courts laid it down that the debtor could not by any engagement entered into at the time of the loan preclude himself from his right to redeem, and generally that it was inequitable that a creditor should obtain, through the necessities of his debtor, and under colour of a mortgage, a collateral advantage beyond the payment of principal, interest, and costs.

Attempts to evade the equity by covenant.

On this point the case of *Howard* v. *Harris* (*g*) is a leading authority. It established the rule curtly expressed in the phrase "once a mortgage always a mortgage," that

Howard v. *Harris*. "Once a mortgage

(*e*) *Langford* v. *Barnard*, Tothill, 134; decided in 1594.
(*f*) 36 & 37 Vict. c. 66.
(*g*) 1 Vern. 190; 2 W. & T. L. C. 1058.

always a mortgage."

the same deed could not at one time be a mortgage, and at another an absolute conveyance. This principle has ever since been strenuously maintained (*h*); and the course of time has produced many important developments.

Invalid stipulations.

Thus equity has refused to allow a stipulation that the mortgagor shall not pay the mortgage debt, or institute proceedings for redemption for twenty years (*i*), or that the mortgagee shall be a receiver of the rents of the estate with a commission (*k*), or that the mortgagee in possession shall receive a certain sum for management (*l*). The tendency of recent decisions, however, has been to relax something of the stringency of the ancient rules as to stipulations for collateral advantages to the mortgagee, beyond his principal, interest, and costs. On a speculative security for example, a *bonus* or commission deducted by the mortgagee at the time of making the advances was allowed, the contract being deliberate and without oppression (*m*). In brewers' mortgages also, a covenant for the exclusive purchase of the mortgagees' beer has been admitted (*n*) as not being a clog on the redemption; but the benefit of such a covenant cannot be asserted after redemption (*o*). At one time a stipulation for the payment of compound interest was discountenanced, as savouring of usury, but the former strictness has been relaxed in this respect (*p*). Such interest, however, can only be charged by special agreement (*q*). It is admissible, while reserving a given rate of interest, to agree that on punctual payment

(*h*) *Salt* v. *Northampton*, (1892) A. C. 1; 61 L. J. Ch. 49.

(*i*) *Cowdry* v. *Day*, 1 Giff. 316.

(*k*) *Langstaffe* v. *Fenwick*, 10 Ves. 405.

(*l*) *Comyns* v. *C.*, 5 I. R. Eq. 583; *Eyre* v. *Hughes*, 2 Ch. D. 198.

(*m*) *Mainland* v. *Upjohn*, 41 Ch. D. 126; 58 L. J. Ch. 361; see also *Carritt* v. *Bradley*, (1901) 2 K. B. 550; 70 L. J. K. B. 832. But compare and distinguish *James* v. *Kerr*, 40 Ch. D. 449; 58 L. J. Ch. 355.

(*n*) *Hoddinott* v. *Biggs*, (1898) 2 Ch. 307; 67 L. J. Ch. 540; *Santley* v. *Wilde*, (1899) 2 Ch. 474, reversing 1 Ch. 747; 68 L. J. Ch. 681.

(*o*) *Rice* v. *Noakes*, (1900) 1 Ch. 213; 2 Ch. 445; 69 L. J. Ch. 635; *Noakes* v. *Rice*, (1902) A. C. 24.

(*p*) Coote, 943, 945, ed. 5; *Clarkson* v. *Henderson*, 14 Ch. D. 348.

(*q*) *Daniell* v. *Sinclair*, 6 App. Cas. 181.

the interest shall be reduced (*r*); but if it is stipulated that the rate of interest shall be raised unless punctually paid, this the Court will consider to be of the nature of a penalty, and will not enforce (*s*). But an agreement to pay a future commission from the day of non-payment of interest has been sustained (*t*); and if there is a proviso for reduction of interest on punctual payment, a mortgagee in possession through the mortgagor's default is entitled to the higher rate (*u*).

Apart from recent legislation a solicitor-mortgagee was not entitled to any costs beyond costs out of pocket. Remuneration for personal trouble and profit costs were not allowed (*x*). But by the Mortgagees' Legal Costs Act, 1895 (*y*), he may now charge his ordinary costs for negotiating the mortgage.

Reasonable fines stipulated for in building societies' mortgages are recoverable, the rules for the time being regulating the relations between the society and its mortgagees (*z*).

In accordance with the above principles, equity will not allow a mortgagee to contract with the mortgagor *at the time of the loan*, for the absolute purchase of the lands at a specified sum in case of default in payment at a stated time (*a*). He may, however, agree for a preference of pre-emption in case of sale, and this will be enforced if claimed within a reasonable time (*b*).

Distinction between mortgage and

3. The important distinction must also be observed between a mortgage and an absolute sale of an estate with a

(*r*) *Nicholls* v. *Maynard*, 3 Atk. 519.

(*s*) *Ibid.*; *Stanhope* v. *Manners*, 2 Ed. 199.

(*t*) *General Credit, &c. Co.* v. *Glegg*, 22 Ch. D. 549.

(*u*) *Union Bank, &c.* v. *Ingram*, 16 Ch. D. 53; *Bright* v. *Campbell*, 41 Ch. D. 388.

(*x*) *Field* v. *Hopkins*, 44 Ch. D. 524; *Stone* v. *Lickorish*, (1891) 2 Ch. 363; 60 L. J. Ch. 289; *Fisher* v. *Doody*, (1893) 1 Ch. 129; 62 L. J. Ch. 14; *Eyre* v. *Wynn Mackenzie*, (1894) 1 Ch. 218; 63 L. J. Ch. 239.

(*y*) 58 & 59 Vict. c. 25.

(*z*) *Provident Building Soc.* v. *Greenhill*, 9 Ch. D. 122; *Rosenberg* v. *Northumberland Building Soc.*, 22 Q. B. D. 373; *Bradbury* v. *Wild*, (1893) 1 Ch. 377; 62 L. J. Ch. 503.

(*a*) *Price* v. *Perrie*, Freem. 258.

(*b*) *Orby* v. *Trigg*, 2 Eq. Ca. Abr. 599; *Dawson* v. *D.*, 8 Sim. 346.

sale on condition

proviso for the vendor to re-purchase upon certain terms. If the Court considers that the transaction was not intended as a mortgage, but as such a conditional sale, it will bind the vendor strictly to his contract (*c*). So also where there is an absolute conveyance with a *subsequent* agreement that if the vendor desires it he may have his estate again upon repayment of the purchase-money with interest or costs (*d*).

depends on the circumstances of each particular case.

There being this important distinction between the effect of a mortgage and that of a conditional sale, it is necessary to consider what circumstances will furnish a criterion by which to distinguish between the two transactions; since it is evident that they will often *primâ facie* much resemble one another. There is no positive rule of law for this purpose; it depends upon the particular circumstances of each case.

Parol evidence.

Parol evidence will always be admitted to show that an apparent conveyance was intended as a security only (*e*). If the money alleged to be purchase-money is grossly inadequate as a price for the estate, or if interest is paid on the money, or the grantee accounts for the rents, or the grantor remains in possession, these are circumstances tending to show that the transaction was really a mortgage, and not a sale (*f*). The general principle is that *primâ facie* an absolute conveyance, containing nothing to show the relation of debtor and creditor, does not cease to be a conveyance, and become a mortgage, merely because the vendor stipulates that he shall have a right to re-purchase. If, however, it is shown that, notwithstanding the form of an absolute conveyance, a security only was intended, redemption will be allowed (*g*). The question is, what upon a fair construction is the meaning of the instrument (*h*).

(*c*) *Alderson* v. *White*, 2 De G. & J. 97.

(*d*) *Cotterell* v. *Purchase*, Ca. t. Talb. 61.

(*e*) *England* v. *Codrington*, 1 Ed. 169; *Maxwell* v. *Montacute*, Prec. Ch. 526.

(*f*) *Brooke* v. *Garrod*, 3 K. & J. 608; 2 De G. & J. 62; *Williams* v. *Owen*, 5 My. & Cr. 303.

(*g*) *Barton* v. *Bk. of N. S. W.*, 15 App. Cas. 379; and see *Lisle* v. *Reeve*, (1902) 1 Ch. 53.

(*h*) Coote, 20—22, ed. 5; *Shaw* v. *Jeffry*, 13 Mo. P. C. 432.

There may also be a valid sale or release of the equity of redemption by the mortgagor to the mortgagee, and even if the consideration is inadequate, it will be enforced in the absence of fraud or duress (*i*).

Release or sale of equity of redemption.

Where the conveyance of an estate to a person by way of mortgage is intended to be in the nature of a family settlement, the equity of redemption may, contrary to the general rule, be confined to the life of the settlor or mortgagor, and his heirs will not be allowed to redeem (*k*).

Mortgage by way of family settlement.

4. The case of *Casborne* v. *Scarfe* (*l*) is the leading case establishing that an equity of redemption is not a mere *right*, as was considered in some early cases. It is, on the contrary, an estate in the land, and may be dealt with as such; for instance, it may be devised, granted, or entailed with remainders, and such entail and remainders might be barred by fine and recovery. Or it may be settled or mortgaged; only so, however, that all incumbrances subsequent to the first, if he has the legal estate, will take subject to his prior right.

Equity of redemption an estate.

Casborne v. *Scarfe*.

Further, the owner of an equity of redemption being considered as owner of the land, on his death intestate the descent of the equity of redemption will be governed by the same rules of law as the legal estate, whether the general rules of law or those of a special custom, such as gavelkind or borough English (*m*).

5. The case of *Thornborough* v. *Baker* (*n*) illustrated another incident of the equity of redemption; namely, that while in the case of a mortgage in fee, on the decease of the mortgagee, his *heir* must reconvey, on payment of the mortgage money, interest and costs, yet his *legal personal representative* will be entitled to the money. Now, however, power is conferred on the personal representatives

Legal personal representative of mortgagee entitled to mortgage debt.

Thornborough v. *Baker*.

(*i*) *Ford* v. *Olden*, 3 Eq. 461.

(*k*) *Newcomb* v. *Bonham*, 1 Vern. 7; *Bonham* v. *Newcomb*, *ibid.* 214; *King* v. *Bromley*, 1 Eq. Ca. Abr. 595.

(*l*) 1 Atk. 603; 2 W. & T. L. C. 1051.

(*m*) *Fawcett* v. *Lowther*, 2 Ves. sr. 301, 304.

(*n*) 1 Ch. Ca. 283; 3 Swanst. 628; 2 W. & T. L. C. 1046.

to convey, the estate being deemed to vest in them as if it were a chattel real (*o*). But this section does not apply to land of copyhold or customary tenure (*p*). In the case of an absolute conveyance with a collateral agreement for re-purchase, if the purchaser dies seised, and the person who conveyed to him then exercises his option of re-purchase, the heir, and not the executor, of the purchaser will be entitled to the money (*q*).

III. *Assignment of Mortgages.*

Mortgagee may assign alone;

but assignee should require concurrence of mortgagor,

A mortgagee has power alone at any time to assign the mortgage; but the assignee should for his own protection always obtain the concurrence of the mortgagor. This is necessary because the assignee can only take subject to all equities, and to the state of the account as between the mortgagor and mortgagee. If the mortgagor does not concur, he is not bound by the amount of the debt appearing upon the face of the mortgage. If, in fact, the mortgage debt has been paid off, the security is determined; if partly paid, it is determined *pro tanto* (*r*). Further, if

or at least give notice.

a mortgage is assigned, and the assignee fails to give notice of the transfer to the mortgagor, his security is liable to be prejudiced by any payments made by the mortgagor to the mortgagee subsequent to the assignment (*s*). *A fortiori* a mortgagor cannot be prejudiced by any agreement between a mortgagee and his assignee to increase the amount of the principal due, as by converting interest into principal (*t*); but if the assignment

(*o*) 44 & 45 Vict. c. 41, s. 30.
(*p*) 57 & 58 Vict. c. 46, s. 88.
(*q*) *St. John* v. *Wareham*, cited 3 Swanst. 631.
(*r*) *Matthews* v. *Wallwyn*, 4 Ves. 118; *Williams* v. *Sorrell*, *ibid.* 389.
(*s*) *Chambers* v. *Goldwin*, 9 Ves. 254; *Turner* v. *Smith*, (1901) 1 Ch. 213; 70 L. J. Ch. 144.
(*t*) *E. of Macclesfield* v. *Fitton*, 1 Vern. 169.

is with the concurrence of the mortgagor, and there is an arrear of interest thereon, any interest paid by the assignee to the mortgagee will be taken as principal, and will carry interest (*u*).

Mortgagee in possession accountable after assignment.

Moreover, if a mortgagee is in possession, he is considered in equity for many purposes as a trustee; and then, if he voluntarily assigns the mortgage, without the consent of the mortgagor, he will still remain liable to account for the profits, on the principle that it would be a breach of trust to assign to an unreliable person (*x*). This is not so, however, where the assignment is directed by order of the Court (*y*).

Assignee may usually recover the whole mortgage debt.

It has been questioned whether, in cases in which an assignee purchases a mortgage for less than is due upon it, he is entitled to claim from the mortgagor the whole of the original sum, or only the amount which he has paid. As a general rule, it appears that he is entitled to the benefit of his purchase, and may claim the whole debt (*z*).

Secus if there is a fiduciary relation.

But if the purchaser stands in any fiduciary relation towards the owner of the estate, as trustee, executor, guardian, or agent, he will be considered as having purchased for the benefit of the estate, and will only be allowed repayment of what he actually gave (*a*).

IV. *Persons entitled to Redeem.*

Persons entitled to redeem:

Having discussed some of the principal characteristics of an equity of redemption, the next inquiry is as to what persons are or may be entitled to redeem.

(*u*) *Ashenhurst* v. *James*, 3 Atk. 271.

(*x*) 1 Eq. Ca. Abr. 328; *National Bank of Australia* v. *Hand in Hand Co.*, 4 App. Cas. 391.

(*y*) *Hall* v. *Heward*, 32 Ch. D. 430; 55 L. J. Ch. 604; *Magnus* v. *Queensland, &c. Bank*, 36 Ch. D. 25; 57 L. J. Ch. 413.

(*z*) *Phillips* v. *Vaughan*, 1 Vern. 336; *Anon.*, 1 Salk. 155.

(*a*) *Morret* v. *Paske*, 2 Atk. 52, 54.

Heir.

(1.) We have seen that the equity of redemption may descend to an heir. In other words, an heir may redeem; and it is sufficient for him to show a *primâ facie* title (*b*).

Devisee.

(2.) An equity of redemption may be devised—*i.e.*, a devisee may bring an action to redeem (*c*).

Assignee.

(3.) An equity of redemption may be assigned; thus, an assignee may redeem (*d*). If on the assignment an intention appears to keep the security alive, it is not extinguished, but enures for the benefit of the assignee (*e*).

Trustee in bankruptcy.

(4.) An equity of redemption, being an estate in the mortgagor, devolves upon his bankruptcy upon the trustee; thus a trustee in bankruptcy is entitled to redeem (*f*).

Judgment creditors when their lien is complete.

(5.) Judgment creditors, who have a lien on an equity of redemption, are entitled to redeem (*g*); but it is necessary that they should have issued execution under 23 & 24 Vict. c. 38, or 27 & 28 Vict. c. 112 (*h*), as otherwise their lien on the land is not complete. It is to be observed that the appointment of a receiver operates as an equitable execution, and a judgment creditor is entitled to this remedy (*i*).

Plaintiff in administration suit.

(6.) A plaintiff in a creditor's suit for administration may, after a decree for sale of the real estate, bring an action against the mortgagee to redeem, in order to carry out the sale (*k*).

Crown on forfeiture.

(7.) When an equity of redemption became forfeited to the Crown, the Crown or its grantee might redeem (*l*).

Lord on escheat.

(8.) So a lord claiming the reversion by escheat may redeem a mortgage term (*m*).

(*b*) *Pym* v. *Bowreman*, 3 Swanst. 241, n.; *Lloyd* v. *Wait*, 1 Ph. 61.

(*c*) *Lewis* v. *Nangle*, 2 Ves. sr. 431.

(*d*) *Anon.*, 3 Atk. 314.

(*e*) *Thorne* v. *Cann*, (1895) A. C. 11; 64 L. J. Ch. 1; *Liquidation, &c. Co.* v. *Willoughby*, (1898) A. C. 321; 67 L. J. Ch. 251.

(*f*) *Franklyn* v. *Fern*, Barnard. Ch. 30.

(*g*) *Stonehewer* v. *Thompson*, 2 Atk. 440.

(*h*) *E. of Cork* v. *Russell*, 13 Eq. 210, 215; see now 63 & 64 Vict. c. 26.

(*i*) *Anglo-Italian Bk.* v. *Davies*, 9 Ch. D. 275; *Westhead* v. *Riley*, 25 *ibid.* 413; 53 L. J. Ch. 1153.

(*k*) *Christian* v. *Field*, 2 Ha. 177.

(*l*) *Att.-Gen.* v. *Crofts*, 4 Bro. P. C. 136.

(*m*) *Downe* v. *Morris*, 3 Ha. 394.

(9.) Where a voluntary conveyance was void under 27 Eliz. c. 4, as against purchasers, and so against the mortgagee, who is *pro tanto* a purchaser, nevertheless a volunteer under such a conveyance of an equity of redemption was permitted to redeem (*n*). Volunteers.

(10.) In short, any person interested in the equity of redemption may redeem—*e.g.*, a dowress (*o*); a tenant for life, remainderman or reversioner (*p*), the tenant for life having the first option, his consent being necessary to redemption by a remainderman (*q*); a tenant by the curtesy (*r*); a jointress (*s*); and a lessee (*t*). Any person interested in equity of redemption.

(11.) Lastly, a subsequent mortgagee may redeem, making the mortgagor or his heir a party to his action (*u*). A subsequent mortgagee.

Any person entitled to redeem the mortgage may redeem any incumbrancer prior to himself on payment of his principal, interest and costs (*x*); and on tendering the redemption money he is entitled to a delivery of the title deeds, and to have a conveyance of the property redeemed (*y*).

A mortgagor entitled to redeem has power to require the mortgagee, instead of reconveying, to assign the mortgage debt, and convey the property to any third person (*z*); and this right can be enforced against any mortgagee *who has not been in possession*, by the mortgagor and each incumbrancer, notwithstanding any intermediate incumbrance. In case of conflicting claims, the requisition or a prior incumbrancer prevails over that of a subsequent incumbrancer or the mortgagor (*a*).

(*n*) *Rand* v. *Cartwright*, 1 Ch. Ca. 59; see now 56 & 57 Vict. c. 21.

(*o*) *Palmer* v. *Danby*, Prec. Ch. 137.

(*p*) *Aynsly* v. *Reed*, 1 Dick. 249.

(*q*) *Ravald* v. *Russell*, Yo. 9; *Prout* v. *Cock*, (1896) 2 Ch. 808; 66 L. J. Ch. 24.

(*r*) *Jones* v. *Meredith*, Bunb. 357.

(*s*) *Howard* v. *Harris*, *sup.* p. 255.

(*t*) *Tarn* v. *Turner*, 39 Ch. D. 456; 57 L. J. Ch. 452.

(*u*) *Fell* v. *Brown*, 2 Bro. C. C. 276; *Farmer* v. *Curtis*, 2 Sim. 446.

(*x*) *Exp. Carr*, 11 Ch. D. 62; *Elton* v. *Curteis*, 19 *ibid.* 49.

(*y*) *Pearce* v. *Morris*, 5 Ch. 227.

(*z*) 44 & 45 Vict. c. 41, s. 15.

(*a*) 45 & 46 Vict. c. 39, s. 12; *Teevan* v. *Smith*, 20 Ch. D. 724; and see *Alderson* v. *Elgey*, 26 *ibid.* 567; *Smithett* v. *Hesketh*, 44 Ch. D. 161; 59 L. J. Ch. 567; *Prytherch* v. *Williams*, 42 Ch. D. 599; 59 L. J. Ch. 79.

V. *Time of Redemption.*

No power to redeem before the time named.

If not then, six months' notice.

1. A person cannot redeem before the time appointed in the mortgage deed, although he tenders to the mortgagee both the principal and the interest due up to that time (*b*). If he does not pay the debt at the appointed time, he must give six months' notice of his intention to do so, and pay punctually on the expiration of the notice, since it would evidently be unfair to the mortgagee to compel him to accept his money without giving him an opportunity of providing for its reinvestment. If, however, the mortgagee demands, or takes any steps to compel payment, no notice is required, nor is interest payable in lieu thereof (*c*). But when a foreclosure order has been made, the mortgagor cannot claim to redeem on an earlier day than that fixed by the order, on payment of the principal money with interest to the day of payment only (*d*).

If due notice is given, and then the mortgagee refuses to accept a full tender of the principal, interest, and costs, thus compelling the mortgagor to seek a remedy in an action for redemption, the mortgagee will be compelled to pay the costs of the action (*e*).

Limitation apart from the statute.

Disability.

2. Independently of the Statute of Limitations (*f*), a mortgagee could not generally be disturbed after twenty years' possession without any acknowledgment of the mortgagor's title (*g*). The imprisonment, infancy, coverture, or absence beyond seas of the mortgagor were regarded as exceptional circumstances entitling him to exceptional consideration, and, after the analogy of the older statute (*h*), ten years were allowed after the removal

(*b*) *Brown* v. *Cole*, 14 Sim. 427; *West Derby Union* v. *Metrop., &c. Soc.*, (1897) A. C. 647; 66 L. J. Ch. 726.

(*c*) *Letts* v. *Hutchins*, 13 Eq. 176; *Prescott* v. *Phipps*, 23 Ch. D. 372; *Bovill* v. *Endle*, (1896) 1 Ch. 648; 65 L. J. Ch. 542; *Smith* v. *S.*, (1891) 3 Ch. 550; 60 L. J. Ch. 694.

(*d*) *Hill* v. *Rowlands*, (1897) 2 Ch. 361; 66 L. J. Ch. 689.

(*e*) *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119, 128; *Harmer* v. *Priestley*, 16 Beav. 569.

(*f*) 3 & 4 Will. IV. c. 27.

(*g*) *Anon.*, 3 Atk. 313.

(*h*) 21 Jac. I. c. 16.

of the disability (*i*). Moreover, even in the absence of fraud or oppression, a very slight act of acknowledgment of title on the part of the mortgagee, such as keeping private accounts of the profits, sufficed to preserve the equity of redemption (*k*). *A fortiori* the keeping of accounts with the mortgagor or his heir, or an acknowledgment of the equity of redemption in a conveyance or devise, would suffice for that purpose (*l*); and even parol evidence of the conversation of the mortgagee has been admitted on behalf of a mortgagor seeking redemption (*m*). But the acknowledgment, to be effectual, should, it seems, be made before the expiration of the statutory period (*n*).

Acknowledgment.

Parol evidence.

3. Many of the difficulties which thus arose on the question of acknowledgment were put an end to by 3 & 4 Will. IV. c. 27, which fixed the limitation of the mortgagor's equity at twenty years after the time at which the mortgagee obtained possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, should have been given to the mortgagor or some person claiming his estate, or to an agent of such mortgagor or person, *in writing* signed by the mortgagee or the person claiming through him. The same statute further provides that if there be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment if given to any of such mortgagors or persons, shall be as effectual as if given to all; but that if there shall be more than one mortgagee, &c., the signature of one shall be only effectual against himself and the persons claiming through or under him (*o*).

Statute 3 & 4 Will. IV. c. 27, s. 28.

This section has now been replaced by the provisions

37 & 38 Vict. c. 57.

(*i*) *Jenner* v. *Tracy*, 3 P. Wms. 287, n.

(*k*) *Fairfax* v. *Montague*, cited 2 Ves. jr. 84; *Hansard* v. *Hardy*, 18 Ves. 455.

(*l*) *Smart* v. *Hunt*, 4 Ves. 478, n.; *Conway* v. *Shrimpton*, 5 Bro. P. C. 187.

(*m*) *Perry* v. *Marston*, 2 Cox, 295; see *Whiting* v. *White*, 2 Cox, 290.

(*n*) *Markwick* v. *Hardingham*, 15 Ch. D. 339.

(*o*) Sect. 28.

of a more recent statute (*p*) which came into operation on the 1st January, 1879, and which enacts that when a mortgagee shall have obtained possession or receipt of the profits of land, or of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage, but within *twelve* years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor or of his right to redemption shall have been given to the mortgagor, or to some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no action shall be brought but within twelve years after such acknowledgment. The provisions for the cases of an acknowledgment by one of two or more mortgagors or to one of two or more mortgagees correspond to those of the earlier Act.

Time only runs when possession is adverse.

Time will not run under these Acts against the mortgagor while the possession of the mortgagee is not adverse, but may be referred to another title; thus, for instance, if a mortgagee having purchased the estate of a tenant for life who has joined the remainderman in mortgaging the estate, enters into possession, time will not run against the remainderman during the life of the tenant for life (*q*), because until the death of the latter the mortgagee's possession does not conflict with the rights of the remainderman.

What is sufficient acknowledgment.

4. There are numerous cases respecting the question as to what is a sufficient acknowledgment within the statutes. It will be observed that by the language of both Acts the acknowledgment must be given to the mortgagor himself, or to those claiming his estate; an admission to a third person does not suffice, except indeed to an agent or

(*p*) 37 & 38 Vict. c. 57.
(*q*) *Hyde* v. *Dallaway*, 2 Ha. 528; *Hugill* v. *Wilkinson*, 38 Ch. D. 480; 57 L. J. Ch. 1019.

solicitor of the mortgagor or claimant (*r*). No particular form of acknowledgment is required, nor need the amount due be stated (*s*); an acknowledgment will not, however, be inferred from equivocal expressions (*t*).

It has been decided that the sections suspending the running of the statute pending disability do not apply as between mortgagor and mortgagee (*u*).

VI. *Mortgage of Wife's Property by Husband and Wife.*

Wife's estate considered only as a surety.

It is a well established rule that whenever a husband and wife join in mortgaging the wife's estate of inheritance for the benefit of the husband, her estate will be considered only as surety for his debt; and on the husband's death the wife or her heir will be entitled to have her estate exonerated out of his property, and will be preferred to the legatees, though not to the creditors of the husband (*x*).

If wife pays mortgage debt she may stand in place of the mortgagee;

Upon the same principle where a wife paid her husband's mortgage debt by a loan out of her separate estate, she was held entitled to stand in the place of the mortgagee (*y*), and where she joined with him in charging her estate she was similarly entitled (*z*). *A fortiori*, if she alone mortgages her separate estate to raise money for her husband, she is in the same position as any other of his creditors (*a*).

(*r*) *Trulock* v. *Roby*, 12 Sim. 402; 2 Ph. 395; *Stansfield* v. *Hobson*, 3 De G. M. & G. 620.

(*s*) *Ibid.*; *St. John* v. *Boughton*, 9 Sim. 219.

(*t*) *Thompson* v. *Bowyer*, 9 Jur. N. S. 863; *Astbury* v. *A.*, (1898) 2 Ch. 111; 67 L. J. Ch. 471.

(*u*) *Kinsman* v. *Rouse*, 17 Ch. D. 104; 50 L. J. Ch. 486; *Forster* v. *Patterson*, 17 Ch. D. 132; 50 L. J. Ch. 603; *Sands to Thompson*, 22 Ch. D. 614; 52 L. J. Ch. 406.

(*x*) *Tate* v. *Austin*, 1 P. Wms. 264; *Hudson* v. *Carmichael*, Kay, 613, 620.

(*y*) *Parteriche* v. *Powlet*, 2 Atk. 384.

(*z*) *Ibid.*; *Robinson* v. *Gee*, 1 Ves. sr. 252.

(*a*) *Hudson* v. *Carmichael*, *sup.*

but the debt must be his debt.

But in order to claim exoneration from the husband's estate, the debt must be distinctly his debt. A mortgage of the wife's estate in order to pay debts contracted by her before marriage (*b*), or a mortgage effected before her marriage, which the husband afterwards covenants to pay, will not be charged against the husband's property to exonerate that of the wife (*c*). And the same rule applies if the wife receives into her own hands or has the absolute disposal of the mortgage money (*d*). The burden of proof is not, however, on the wife, to show that the money was applied for her husband's benefit, but it is for his representatives to show that it was not so (*e*); and they may avail themselves of parol declarations of the wife for this purpose (*f*).

The burden of proof on the husband's representatives.

Resulting trust for the wife.

Where the wife's estate is mortgaged, notwithstanding that the equity of redemption is reserved to the heirs of the husband, there will be a resulting trust for the wife and her heirs (*g*). The mere form of reservation is not sufficient to alter the previous title, but is considered as an inaccuracy or mistake to be corrected by the state of the title as it was before the mortgage (*h*).

Nevertheless, if it appears to have been the intention of the wife to alter the limitation of the equity of redemption, effect will of course be given to it. The presumption is the other way, but may be rebutted by satisfactory evidence (*i*).

(*b*) *Lewis* v. *Nangle*, 1 Cox, 240; Amb. 150.

(*c*) *Bagot* v. *Oughton*, 1 P. Wms. 347.

(*d*) *Clinton* v. *Hooper*, 1 Ves. jr. 173; 3 Bro. C. C. 201, 212; *Thomas* v. *T.*, 2 K. & J. 79.

(*e*) *Kinnoul* v. *Money*, 3 Swanst. 202, 208, n.

(*f*) *Clinton* v. *Hooper*, *sup.*

(*g*) *Huntingdon* v. *H.*, 2 Vern. 437; *Broad* v. *B.*, 2 Ch. Ca. 161.

(*h*) *Ruscombe* v. *Hare*, 6 Dow, 1; 2 Bli. N. S. 192; *Jones* v. *Davies*, 8 Ch. D. 205; *Plomley* v. *Felton*, 14 App. Cas. 61; *Williams* v. *Mitchell*, (1891) 3 Ch. 474; 60 L. J. Ch. 807; *Davis* v. *Whitehead*, (1894) 2 Ch. 133; 63 L. J. Ch. 471.

(*i*) *Jackson* v. *James*, 1 Bli. 104; *Reeve* v. *Hicks*, 2 S. & S. 403.

VII. *Mortgages of Personalty—Bills of Sale.*

For the protection of creditors against secret dispositions of property to their prejudice, and at the same time for the protection of debtors against the machinations of money-lenders, mortgages of personal chattels have been made the subject of special legislation.

Before, however, directing attention to the provisions of the Acts by which such transactions are regulated, it is necessary to refer to certain rules which, apart from the statutes, distinguish mortgages of personalty from mortgages of real estate.

Mortgage contrasted with pledge.

First, the distinction must be observed between a mortgage and a pledge, a distinction analogous to that of Roman Law between the contracts of *hypotheca* and *pignus*.

We have seen that a mortgage is a conveyance or transfer of property upon condition, becoming absolute if the condition is not performed, but subject to be avoided by performance of the condition. And this definition is as applicable to mortgages of personalty as to those of realty.

Pledges.

A pledge or pawn, on the other hand, is a security created by the actual or constructive delivery of the *possession* of a personal chattel to a bailee, or pledgee, the general property in the chattel remaining in the pledgor; the pledgee having only a special property or right of retainer until the payment of the debt secured (*k*). The law as to pledges does not require detailed exposition here, falling rather under the head of bailments at Common Law than under any doctrine of equity.

Remedies of pledgee.

A pledgee can, only under special circumstances, sue in equity for foreclosure and sale of his pledge (*l*), though if a time for redemption has been fixed by the contract, he may, on giving due notice to the pledgor, sell without

(*k*) *Jones* v. *Smith*, 2 Ves. jr. 372, 378; *North-Western Bk.* v. *Poynter*, (1895) A. C. 56; 64 L. J. P. C. 27.

(*l*) *Exp. Mountfort*, 14 Ves. 606; *Carter* v. *Wake*, 4 Ch. D. 605; *General Credit, &c. Co.* v. *Glegg*, 22 Ch. D. 549.

applying for the authority of a judicial decree (*m*). If no time has been fixed for payment there must be a previous demand (*n*). The same rules apply when the subject-matter of the security is a chose in action (*n*). A Court of Common Law is, however, the proper forum for a pledgor seeking to redeem, unless the need of some special equitable relief, such as account, or an assignment of the pledge, necessitates an appeal for equitable assistance (*o*).

Reversionary interests in settled funds are commonly resorted to as a security, and money raised thereon by mortgage. In such a case if the reversion falls into possession before the mortgagee has exercised his power of sale, the mortgagee is entitled only to the amount of his mortgage debt and interest; and if there is a surplus, the settlement trustees must hold it for the benefit of subsequent incumbrancers, or, if there are none, of the mortgagor (*p*).

Mortgages of ships are subject to special statutory provisions, and a legal mortgage must be expressed and transferred in the forms prescribed by the Merchant Shipping Act, 1894 (*q*), and duly registered. Interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in the same manner as in respect of any other personal property. *Semble* that an agreement to transfer a ship is not within the registration clause of the Act (*r*). Registered mortgages rank according to their dates of registration; but an unregistered mortgage is valid as between mortgagor and mortgagee, and generally against all persons except a subsequent registered mortgagee (*s*).

(*m*) *Martin* v. *Reid*, 11 C. B. N. S. 730; *Kemp* v. *Westbrook*, 1 Ves. sr. 278; *Jones* v. *Marshall*, 24 Q. B. D. 269; 59 L. J. Q. B. 123.

(*n*) *France* v. *Clark*, 22 Ch. D. 830; 26 *ib.* 257; 52 L. J. Ch. 362; 53 *ib.* 588.

(*o*) *Jones* v. *Smith*, 2 Ves. jr. 272.

(*p*) *Jeffery* v. *Sayles*, (1896) 1 Ch. 1; 65 L. J. Ch. 188; cf. *Re Foligno's Mortgage*, 32 Beav. 131.

(*q*) 57 & 58 Vict. c. 60.

(*r*) *Batthyany* v. *Bouch*, 50 L. J. Q. B. 421.

(*s*) *Keith* v. *Burrows*, 2 App. Cas. 636; *Black* v. *Williams*, (1895) 1 Ch. 408; 64 L. J. Ch. 137.

Leaseholds.

Mortgages of leaseholds generally follow the analogy of those of freeholds, giving rise to the same remedies of foreclosure or sale on the one hand, and redemption on the other. There is, however, an important distinction between such mortgages and mortgages of personal chattels. The latter are indeed subject to redemption in the usual way (*t*); but the mortgagee, after breach of condition, has a right to sell after a reasonable time, upon giving due notice, without suing for foreclosure (*u*). And the same applies to a mortgage of shares (*x*). Moreover, there being no statute of limitation applying to a mortgage of personal property, the right of foreclosure may be asserted, notwithstanding that the personal remedy for the mortgage debt is statute barred (*y*).

Personal chattels.

Bills of Sale Acts.

But the chief distinctions relating to mortgages of chattels are those which arise from the provisions of the Bills of Sale Acts, 1854, 1878 and 1882 (*z*).

17 & 18 Vict. c. 36.

The causes which led to legislation on this subject are well indicated in the preamble to the Act of 1854, which recites that "Frauds are frequently committed upon creditors by "secret bills of sale of personal chattels, whereby persons "are enabled to keep up the appearance of being in good "circumstances and possessed of property, and the grantees "or holders of such bills of sale have the power of taking "possession of the property of such persons to the "exclusion of the rest of their creditors."

In order to check such dishonest obtaining of credit, this Act provided that all bills of sale of *personal chattels* whereby the grantee or owner should have the power, with or without notice, to seize or take possession of the property subject thereto, should, unless registered as therein directed, be void as against the assignees in bankruptcy, or

(*t*) *Kemp* v. *Westbrook*, *sup.*

(*u*) *Tucker* v. *Wilson*, 1 P. Wms. 261.

(*x*) *Deverges* v. *Sandemann*, (1901) 1 Ch. 70; 70 L. J. Ch. 47; (1902) 1 Ch. 579.

(*y*) *London & M. Bk.* v. *Mitchell*, (1899) 2 Ch. 161; 68 L. J. Ch. 568.

(*z*) 17 & 18 Vict. c. 36; 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.

under an assignment for the benefit of creditors of the grantor, and as against all persons seizing the property comprised therein in execution of any process of the Courts, so far as regarded the property in or right to the possession of any *personal chattels* comprised therein, which at or after the time of such bankruptcy or the execution of such assignment or of the executing such process, and after the expiration of twenty-one days, should be in the possession or *apparent possession* of the person making the bill of sale.

The great number and difficulty of the questions arising respecting the interpretation of this Act necessitated further legislation for their satisfactory solution. At the same time it was found necessary to provide for and counteract some ingenious modes of evading the Act which had been invented by keen practitioners, and further to provide for the protection not only of the creditors of the grantor, but of the grantor himself. Hence the more detailed and stringent measures of 1878 (*a*) and 1882 (*b*), by which statutes the law respecting mortgages of personal chattels is now regulated.

It must suffice to briefly summarize the results of this legislation.

Meaning of "bill of sale."

1. Under the Act of 1878, the expression "Bill of Sale" includes assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods and other assurances of personal chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred. Marriage settlements and

(*a*) 41 & 42 Vict. c. 31. (*b*) 45 & 46 Vict. c. 43.

agreements for settlements are exempt from the Act (*c*), but not post-nuptial settlements (*d*).

The Act of 1882 only applies to bills of sale or other documents included in the above category, which are given as security for money lent (*e*). It declares void all bills of sale for sums under £30 (*f*). Neither Act applies to the debentures of incorporated companies (*g*). But the debentures of an industrial or provident society which is under no statutory obligation to keep a register of securities are not within the exemption and require registration as bills of sale (*h*).

Registration.

2. A bill of sale must now be duly attested and registered within seven days of its execution; and an affidavit must be registered with it stating the execution and the true date thereof, and the residence and occupation of the grantor and of the attesting witnesses. Where the bill of sale is by way of absolute gift, the execution must be attested by a solicitor. Hire purchase agreements, if *bonâ fide*, are not within the Act and do not require registration; but it is otherwise if there is in effect a bill of sale as security under the colourable form of such an agreement (*i*).

Priority.

If two or more bills of sale are given comprising in whole or in part the same chattels, they shall have priority in *order of the date of their registration* as regards such chattels (*k*). Moreover, the registration of a bill of sale must be renewed every five years (*l*) or it will be wholly void (*m*); and where a subsequent bill of sale is executed

(*c*) S. 4; *Wenman* v. *Lyon*, (1891) 2 Q. B. 192; 60 L. J. Q. B. 663.
(*d*) *Ashton* v. *Blackshaw*, 9 Eq. 510.
(*e*) *Swift* v. *Pannell*, 24 Ch. D. 210.
(*f*) S. 12.
(*g*) *Re Standard Manufacturing Co.*, (1891) 1 Ch. 627; 60 L. J. Ch. 292; *Richards* v. *Kidderminster Overseers*, (1896) 2 Ch. 212; 65 L. J. Ch. 502.
(*h*) *G. N. Ry. Co.* v. *Coal Co-operative Soc.*, (1896) 1 Ch. 187; 65 L. J. Ch. 214.
(*i*) *Beckett* v. *Tower Assets Co.*, (1891) 1 Q. B. 638; 60 L. J. Q. B. 493; *Mellor's Trustee* v. *Maas*, (1902) 1 Q. B. 137.
(*k*) 41 & 42 Vict. c. 31, s. 10.
(*l*) S. 11; *Exp. Furber*, (1893) 2 Q. B. 122; 62 L. J. Q. B. 355.
(*m*) *Fenton* v. *Blythe*, 25 Q. B. D. 417; 59 L. J. Q. B. 589.

within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised therein, and is given as security for the same or any part of the same debt, such subsequent bill shall be absolutely void as regards such chattels and debt, unless proved to have been given *bonâ fide* to correct some material error in the prior bill of sale (*n*). Time for registration may be extended, but not so as to prejudice the rights of third parties accrued in the meantime (*o*).

Form of bill of sale

3. If given as security for money lent, a bill of sale must contain a schedule specifically enumerating the personal chattels comprised therein, and is void, except as against the grantor, in respect of any personal chattels not so described (*p*); and must be made in accordance with the form in the schedule to this Act annexed. This form requires the consideration given to be stated, and the statement must be clear and precise (*q*). The rate of interest must also be stated (*r*), and the time or times at which the payments of principal and interest are to be made (*s*); and it further provides that the chattels assigned shall not be liable to seizure for any cause other than those specified in sect. 7 of the Act; namely, in case of (1) default by the grantor of payment, or in the performance of covenants necessary for maintaining the security; or (2) in case of his bankruptcy, or distraint for rent, rates, or taxes; or

(*n*) S. 9; *Tuck* v. *S. Cos. Bk.*, 42 Ch. D. 471; 58 L. J. Ch. 699.

(*o*) *Exp. Furber*, (1893) 2 Q. B. 122; 62 L. J. Q. B. 589; *Crew* v. *Cummings*, 21 Q. B. D. 420; 57 L. J. Q. B. 641; *Re Spiral Globe, Ltd.*, (1902) 1 Ch. 396.

(*p*) 45 & 46 Vict. c. 43, s. 4. See *Roberts* v. *R.*, 13 Q. B. D. 794; *Witt* v. *Banner*, 19 *ib.* 276; 20 *ib.* 114; *Kelly* v. *Kellond*, *ib.* 569; *Hickley* v. *Greenwood*, 25 Q. B. D. 277; 59 L. J. Q. B. 413.

(*q*) *Sharp* v. *McHenry*, 38 Ch. D. 427; 57 L. J. Ch. 961; *Darlow* v. *Bland*, (1897) 1 Q. B. 125; 66 L. J. Q. B. 167; *Thomas* v. *Searles*, (1891) 2 Q. B. 408; 60 L. J. Q. B. 722.

(*r*) See *Myers* v. *Elliott*, 16 Q. B. D. 526; *Exp. Stanford*, 17 *ib.* 259; *Edwards* v. *Marston*, (1891) 1 Q. B. 925; 60 L. J. Q. B. 202; *Lumley* v. *Simmons*, 34 Ch. D. 698.

(*s*) See *Hetherington* v. *Groome*, 13 Q. B. D. 789; *Sibley* v. *Higgs*, 15 *ib.* 619; *Hughes* v. *Little*, 18 *ib.* 32; *Exp. Hasluck*, (1894) 1 Q. B. 444; 63 L. J. Q. B. 209.

(3) on fraudulent removal of the goods; or (4) on non-production without reasonable excuse of the last receipt for rent, rates, or taxes; or (5) in case of execution levied against the goods of the grantor. See also cases cited below as to the requirements of the statutory form (*t*). The form does not admit of a valid bill of sale of after-acquired property (*u*), but a covenant to replace damaged articles by others of equal value has been sustained as being for the maintenance of the security (*x*).

Definitions: Personal chattels;

4. The expression "personal chattels" is in the present Act more fully explained than in that of 1854. The Act of 1878 has expressly provided for some difficulties which arose under that Act, by enacting that personal chattels shall mean goods, furniture, and other articles capable of complete transfer by delivery, *and* (*when separately assigned or charged*) *fixtures and growing crops;* but shall not include fixtures (except trade machinery as elsewhere described) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed; nor growing crops when assigned together with any interest in the land on which they grow (*y*). Fixtures and growing crops are not to be deemed to be separately assigned or charged by reason only that they are assigned or charged by separate words, or that power is given to sever them, if by the same instrument any freehold or leasehold interest in the land or building to which they are affixed or in the land on which such crops grow, is also conveyed or assigned to the same persons or person (*z*). But cases in which power is given to sever and separately sell personal chattels

(*t*) *Simmons* v. *Heseltine*, (1892) A. C. 100; 61 L. J. Ch. 252; *Dolcini* v. *D.*, (1895) 1 Q. B. 898; 64 L. J. Q. B. 427; *Linfoot* v. *Pockett*, (1895) 2 Ch. 835; 64 L. J. Ch. 752; *Edwards* v. *Marcus*, (1894) 1 Q. B. 587; 63 L. J. Q. B. 363; *Peace* v. *Brookes*, (1895) 2 Q. B. 451; 64 L. J. Q. B. 747; *Saunders* v. *White*, (1902) 1 K. B. 472.

(*u*) *Thomas* v. *Kelly*, 13 App. Cas. 506; 58 L. J. Q. B. 66.

(*x*) *Seed* v. *Bradley*, (1894) 1 Q. B. 319; 63 L. J. Q. B. 387.

(*y*) S. 4.

(*z*) S. 7; *Batcheldor* v. *Yates*, 38 Ch. D. 112; 57 L. J. Ch. 697; *Brooke* v. *B.*, (1894) 2 Ch. 600; 64 L. J. Ch. 21.

are distinguishable and registration is necessary (*a*). Generally if a document in the nature of a bill of sale is in part bad, lacking registration, other provisions therein operating as collateral security are not necessarily thereby avoided, if distinctly severable (*b*).

Trade machinery is the subject of important new provisions. A detailed and exhaustive definition thereof is given, and it is expressly declared to be within the expression "personal chattels."

Apparent possession.

5. The definition of the term "apparent possession" remains in the Act of 1878 the same as in that of 1854. The "occupation" must be a *de facto* occupation; mere tenancy without residence will not suffice (*c*), but if the debtor is allowed the use of the goods, notwithstanding the formal putting a man into possession for the grantee, the debtor is none the less deemed to be in apparent possession (*d*). *Secus*, however, if the man in possession really has control of the goods (*e*). Where the situation of the goods is consistent with either the husband's or the wife's possession, the law attributes the possession to the one having the legal title (*f*). Wrongful possession takes a case out of the Act (*g*).

It was enacted by the Act of 1878 (*h*) that chattels comprised in a bill of sale which has been and continues to be duly registered under the Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act. This section has been repealed by the Act of 1882, s. 15, in respect of bills of sale given by way of security; but

(*a*) *Climpson* v. *Coles*, 23 Q. B. D. 465; 58 L. J. Q. B. 346; *Small* v. *N. P. Bk.*, (1894) 1 Ch. 686; 63 L. J. Ch. 270; *Johns* v. *Ware*, (1899) 1 Ch. 359; 68 L. J. Ch. 155.

(*b*) *Monetary Advance Co.* v. *Cater*, 20 Q. B. D. 785; 57 L. J. Q. B. 463; *Re Isaacson*, (1895) 1 Q. B. 33; 64 L. J. Q. B. 191.

(*c*) *Robinson* v. *Briggs*, 6 L. R. Exch. 1.

(*d*) *Exp. Jay*, 9 Ch. 697; *Exp. Hooman*, 10 Eq. 63; *Exp. Lewis*, 6 Ch. 626.

(*e*) *Re Francis*, 10 Ch. D. 408, 414.

(*f*) *Ramsey* v. *Margrett*, (1894) 2 Q. B. 18; 63 L. J. Q. B. 513.

(*g*) *Exp. Fletcher*, 5 Ch. D. 809.

(*h*) S. 20.

notwithstanding the repeal the effect of sect. 3 of the last Act is that chattels comprised in a bill of sale registered under the Act of 1878 before the coming into operation of the Act of 1882 are not, so long as the registration is subsisting, within the order and disposition clause (*i*).

Debentures.

It has already been seen that debentures issued by incorporated companies are not within the Bills of Sale Acts. Such debentures usually affect the personalty of the company, and are, therefore, appropriately considered under the present title. But, though in form and effect mortgages, the remedies of debenture holders are in some respects peculiar, owing to the nature of the security, and deserve separate mention. The most usual resource is the appointment of a receiver, or in a suitable case a receiver and manager (*k*). But, if other remedies prove insufficient, a winding-up order may be obtained (*l*), or an order for foreclosure (*m*), or for sale of the property included in the security, unless the company is one of a public character, such as a tramway company (*n*).

(*i*) *Exp. Izard*, 23 Ch. D. 409.

(*k*) *Tillett* v. *Nixon*, 25 Ch. D. 238; 53 L. J. Ch. 199; *Makins* v. *Ibotson*, (1891) 1 Ch. 133; 60 L. J. Ch. 164; *McMahon* v. *North Kent Iron Works*, (1891) 2 Ch. 148; 60 L. J. Ch. 372; *Re Maskelyne*, (1898) 1 Ch. 133; 67 L. J. Ch. 125; *Edwards* v. *Standard Rolling Stock*, (1893) 1 Ch. 574; 62 L. J. Ch. 605; *Bartlett* v. *W. M. Tramways*, (1893) 3 Ch. 437; (1894) 2 Ch. 286; 63 L. J. Ch. 208, 519.

(*l*) *Re Portsmouth Tramways*, (1892) 2 Ch. 362; 61 L. J. Ch. 462.

(*m*) *Sadler* v. *Worley*, (1894) 2 Ch. 170; 63 L. J. Ch. 551; *Elias* v. *Continental, &c. Co.*, (1897) 1 Ch. 511; 66 L. J. Ch. 273.

(*n*) *Marshall* v. *S. Stafford Tramways*, (1895) 2 Ch. 36; 64 L. J. Ch. 481; but see *Bartlett* v. *W. M. Tramways Co.* (No. 2), *sup.*

Section II.—Rights of Mortgagor and Mortgagee.

I. *Mortgagor in Possession.*
II. *Accounting.*
III. *Remedies of Mortgagees.*
IV. *Tacking.*
V. *Consolidation.*

I. *Rights of a Mortgagor in Possession.*

Not accountable for profits.

While a mortgagor remains in possession he is not required to account for the rents and profits of the mortgaged estate (*a*); nor is his agent, or any person claiming under his voluntary revocable deed (*b*). He is not liable to pay an occupation rent, unless and until a receiver is appointed, and demand made (*c*).

After default liable to eviction.

He has not, however, an unrestricted power of dealing with the estate as its owner. As soon as default has been made, he is in the position somewhat analogous to that of a tenant at will of the mortgagee: he is liable to eviction without any notice (*d*); but, herein differing from a tenant at will, he has no right to the emblements, these being part of the security (*e*).

Powers of leasing. 44 & 45 Vict. c. 41.

By 44 & 45 Vict. c. 41, s. 18, a mortgagor *in possession* is enabled to make certain leases valid against any incumbrancer (*f*), and a mortgagee in possession is enabled to

(*a*) *Colman* v. *D. of St. Albans*, 3 Ves. 25.
(*b*) *Hele* v. *Bexley*, 20 Beav. 127.
(*c*) *Yorkshire Banking Co.* v. *Mullan*, 35 Ch. D. 125.
(*d*) *Doe* d. *Roby* v. *Maisy*, 8 B. & C. 767.
(*e*) *Keech* v. *Hall*, Doug. 22.
(*f*) *Wilson* v. *Queen's Club*, (1891) 3 Ch. 522; 60 L. J. Ch. 698; *Browne* v. *Peto*, (1900) 1 Q. B. 346; 2 Q. B. 653; 68 L. J. Q. B. 869.

make similar leases valid against all prior incumbrancers and the mortgagor. The leases so authorised are agricultural leases for twenty-one, and building leases for ninety-nine years, taking effect in possession not later than twelve months after date; they must reserve the best reasonable rent, and in other respects comply with the provisions of the Act. When made by a mortgagor in possession, a counterpart must be delivered to the mortgagee. If after a lease granted by a mortgagor in possession the mortgagee takes possession, giving notice to the tenant to pay rent to him, the mortgagee is entitled by virtue of the Act to enforce the covenants and conditions of the lease as if he had been a party to it, and this right cannot be affected by any collateral agreement between the mortgagor and the lessee (*g*). A mortgagee so entering into possession is liable to the tenant to the same extent as the lessor for any compensation under 53 & 54 Vict. c. 57. The Conveyancing Act came into operation on the 1st Jan., 1882, and only applies to mortgages made after that date. These powers may, moreover, be excluded or increased by express contract. In cases not within the statute, neither mortgagor nor mortgagee could alone make a valid lease, unless, of course, power so to do was reserved by the deed (*h*), or under exceptional circumstances (*i*). It should be noted that mining leases are not authorised.

Mortgagor may be restrained from waste, if the security is thereby endangered.

Since the produce of the land is considered as part of the security, a mortgagor in possession may be restrained by injunction from committing waste on the estate, as, for instance, from cutting timber (*k*). A mortgagee is not, indeed, as a matter of course, entitled to such an injunction; it is necessary for him to show that his security is likely to be prejudiced thereby, being already, or in

(*g*) *Municipal, &c. Soc.* v. *Smith*, 22 Q. B. D. 70; 58 L. J. Q. B. 61.

(*h*) *Keech* v. *Hall*, *sup.*

(*i*) *Hungerford* v. *Clay*, 9 Mod. 1; see *Towerson* v. *Jackson*, (1891) 2 Q. B. 484; 61 L. J. Q. B. 36; *Corbett* v. *Plowden*, 25 Ch. D. 678; 54 L. J. Ch. 109.

(*k*) *Farrant* v. *Lovell*, 3 Atk. 723.

consequence of the waste in danger of becoming, insufficient (*l*).

Mortgaged shares may qualify the mortgagor to act as a director of a company (*m*). The mortgagor of an advowson has, on the living becoming vacant, a right to nominate, and may compel the mortgagee to present his nominee, notwithstanding an express agreement to the contrary (*n*).

Can sue in his own name under Jud. Act, 1873, s. 25, sub-s. 5.

Previous to the Jud. Act, 1873 (*o*), a mortgagor, though in possession, could not sue in his own name to recover the land or its rent against a lessee to whom he had leased the land before the mortgage, nor could he sue a trespasser or other wrong-doer in his own name for damages. By this statute this disability has been removed, and it is enacted that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as "to which no notice of his intention to take possession, or "to enter into the receipt of the rents and profits thereof "shall have been given by the mortgagee, may sue for "such possession or the recovery of such rents and profits, "or to prevent or recover damages in respect of any "trespass or other wrong relative thereto (*p*), in his own "name only, unless the cause of action arises upon a lease "or other contract made by him jointly with any other "person" (*q*).

II. *Accounting between Mortgagor and Mortgagee.*

1. A mortgagee being, by virtue of his mortgage, legal owner of the land, is, on default being made by the mort-

(*l*) *King* v. *Smith*, 2 Ha. 239; *Harper* v. *Alpin*, 54 L. T. R. 383.

(*m*) *Pulbrook* v. *Richmond, &c. Co.*, 9 Ch. D. 610; *Bainbridge* v. *Smith*, 41 Ch. D. 462; *Cooper* v. *Griffin*, (1892) 1 Q. B. 740; 61 L. J. Q. B. 563.

(*n*) *Mackenzie* v. *Robinson*, 3 Atk. 558.

(*o*) 36 & 37 Vict. c. 66.

(*p*) *Fairclough* v. *Marshall*, 4 Ex. D. 37.

(*q*) S. 25, sub-s. 5.

gagor, entitled at law to immediate possession, or, if the land be in lease, to receipt of the rents, and equity will not interfere to prevent him from enforcing this remedy. He may enter into possession at any time, and without notice (*r*). He is, however, liable in damages if he enter before default (*s*).

The mere fact that mortgagees are in receipt of the rents and profits of the mortgaged estate does not necessarily make them chargeable as mortgagees in possession. The question whether they are so chargeable depends upon whether *they have taken out of the mortgagor's hands the power and duty of managing the estate*, and dealing with the tenants. Thus an agent of a mortgagor was in the habit of receiving the rents and applying them in payment of interest to the mortgagees; the mortgagees wrote to him inclosing notices to the tenants to pay the rents to them, which he was to serve on them if the mortgagor should attempt to interfere. The agent replied promising to pay the rents to the mortgagees and not to the mortgagor, and he did so, but the notices were not served on the tenants. The Court considered that the agent had not ceased to be agent for the mortgagor, that the management of the estate was not taken out of his hands, and that the mortgagees were not chargeable as if in possession (*t*).

A mortgagee is not, merely because the mortgage deed contains an attornment clause, deemed to be in possession so as to be accountable for the rent reserved by the clause (*u*).

Mortgagee in possession must account strictly.

When in possession, the mortgagee must strictly account for the rents and profits of the mortgaged estate, and if he occupies any part of it himself he will be charged an occupation rent (*x*). If there be no arrears of interest due at

If no arrears

(*r*) 2 Mer. 359; *Lows* v. *Telford*, 1 App. Cas. 414.

(*s*) *Moore* v. *Shelley*, 8 App. Cas. 285; 52 L. J. P. C. 35.

(*t*) *Noyes* v. *Pollock*, 32 Ch. D. 53; 55 L. J. Ch. 513.

(*u*) *Stanley* v. *Grundy*, 22 Ch. D. 478; 52 L. J. Ch. 248.

(*x*) *Smart* v. *Hunt*, 1 Vern. 418, n.

when possession taken, annual rests.

the time he takes possession, and the rents and profits exceed the amount of the interest, the account will generally be taken with annual rests, so that the excess of rent may be annually applied in reducing the principal (*y*). And this applies as well in the case of an occupation rent as in that of other rents and profits (*z*).

Except in mortgage of leaseholds where security is deficient.

In the case, however, of a mortgage of leasehold property, where there is no reasonable certainty that the ground rent and insurance will be duly paid, or the houses kept in repair, the mortgagee is entitled to enter into possession even though no interest is in arrear; and in such a case annual rests will not be directed against him (*a*). The burden of proving the reasonableness of his entry into possession is, however, upon the mortgagee (*a*).

If interest in arrear, annual rests not directed.

If the interest is in arrear when the mortgagee enters into possession, annual rests will, as a rule, not be directed (*b*); and where the liability to account without annual rests has thus once commenced, it continues on the same footing until changed by some further agreement (*c*). The fact that the arrears of interest are subsequently paid off does not of itself entitle the mortgagor to have rests directed in his favour (*d*). If, however, the whole of the debt is paid off by the receipt of the rents, from that time annual rests will be decreed (*e*).

Until whole debt is paid off.

Application of proceeds of sale.

2. A mortgagee in possession who sells part of the mortgaged property under a power of sale in the mortgage, must apply the proceeds of sale first in payment of interest and costs, and then either pay the balance to prior or subsequent incumbrancers or to the mortgagor, or apply it in reduction of the principal due on the mortgage (*f*). A

(*y*) *Shepherd* v. *Elliott*, 4 Mod. 254.
(*z*) *Wilson* v. *Metcalfe*, 1 Russ. 530.
(*a*) *Patch* v. *Wild*, 30 Beav. 99.
(*b*) *Wilson* v. *Cluer*, 3 Beav. 136.
(*c*) *Scholefield* v. *Lockwood*, 32 Beav. 439.
(*d*) *Davis* v. *May*, G. Coop. 238; 19 Ves. 383.
(*e*) *Wilson* v. *Cluer*, *sup.*; *Ashworth* v. *Lord*, 36 Ch. D. 545; 57 L. J. Ch. 230.
(*f*) And see 44 & 45 Vict. c. 41, s. 21, sub-s. 3.

rest will always be directed at the time of the sale if any surplus of sale money beyond the interest and costs is retained by the mortgagee, notwithstanding that interest may have been in arrear when he entered into possession (*g*).

Mortgagee only charged with what he actually receives.

3. In accounting, a mortgagee in possession is, as a rule, only liable for fair rents and profits, or for what he has actually received (*h*). If, however, he has been guilty of wilful default in not receiving them, as by turning out a good tenant, or by letting at less than is offered, or under a restrictive covenant which produces a collateral advantage, he will be charged with what he might have received (*i*).

Account of damages, expenditure,

4. A mortgagee in possession is liable to account for any damage done to the property, as by pulling down buildings improperly (*k*), or by destroying or losing the title deeds (*l*). On the other hand, it is his duty to keep the property in repair, and he will be allowed for money laid out for this purpose, with interest thereon (*m*). So also he will be allowed the costs of protecting the title of the mortgagor (*n*), and, generally speaking, all costs reasonably incurred in relation to the mortgage debt (*o*).

and moneys paid for reasonable improvements.

5. Further, he will be allowed for moneys laid out, with the mortgagor's consent or acquiescence, in the improvement of the property (*p*). And if even without such consent he has reasonably expended money in permanent works on

(*g*) *Thompson* v. *Hudson*, 13 Eq. 497.

(*h*) *Simmins* v. *Shirley*, 6 Ch. D. 173; *Shepard* v. *Jones*, 21 *ib.* 469.

(*i*) *Hughes* v. *Williams*, 12 Ves. 493; *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; *White* v. *City Brewery*, 42 Ch. D. 237; 58 L. J. Ch. 855.

(*k*) *Sandon* v. *Hooper*, 6 Beav. 246.

(*l*) *Brown* v. *Sewell*, 11 Ha. 49.

(*m*) *Sandon* v. *Hooper*, *sup.*; *Eyre* v. *Hughes*, 2 Ch. D. 148.

(*n*) *Sandon* v. *Hooper*, *sup.*; *Parker* v. *Watkins*, Johns. 133.

(*o*) See discussion as to costs generally, *National Prov. Bank* v. *Games*, 31 Ch. D. 582; 55 L. J. Ch. 576; and also *Smith* v. *Watts*, 22 Ch. D. 12; 52 L. J. Ch. 209; *Bird* v. *Wenn*, 33 Ch. D. 219; 55 L. J. Ch. 722; *Wales* v. *Carr*, (1902) 1 Ch. 860.

(*p*) *Trimleston* v. *Hamill*, 1 Ba. & Be. 385.

the property, he is entitled, on taking the accounts, to an inquiry whether the outlay has increased the value of the property; if it has done so, he is entitled to be repaid his expenditure so far as it has increased such value (*q*). He should not, without the mortgagor's acquiescence, however, lay out money so as largely to increase the value of the property, and thus place it beyond the power of the mortgagor to redeem (*r*).

Speculative outlay not required, or proper.

He is not bound to engage in any speculative adventure for the benefit of the estate, as by opening mines or quarries (*s*), which must be at his own risk and hazard. If mines are already opened, he should not make large outlay in improving them (*t*).

Waste only allowed when security insufficient.

6. Until recently, it was only when a mortgaged estate was insufficient in value to pay the mortgage, that a mortgagee in possession might open mines and cut timber (*u*). If, having a sufficient security, he committed such waste, he was charged with the gross receipts, and disallowed the expenses of working (*x*). Now he is empowered when in possession to cut and sell timber and other trees ripe for cutting, not planted or left for shelter or ornament. This applies only to mortgages made after Dec. 31st, 1881.

44 & 45 Vict. c. 41.

Property must be preserved.

A mortgagee in possession is responsible for the integrity of the property; thus, a mortgagee was required to account for the proceeds of coal dug from the mortgaged land by the trespass of adjacent coal-owners (*y*). Formerly a mortgagee of houses could not insure them against fire at the mortgagor's expense in the absence of an express agreement with him, nor could he require the mortgagor to insure them. The power to insure and add the premiums to the mortgaged debt was given by Lord Cranworth's

(*q*) *Shepard* v. *Jones*, 21 Ch. D. 469; *Henderson* v. *Astwood*, (1894) A. C. 150.
(*r*) *Sandon* v. *Hooper*, 6 Beav. 246.
(*s*) *Hughes* v. *Williams*, 12 Ves. 493.
(*t*) *Rowe* v. *Wood*, 2 J. & W. 553.
(*u*) *Millett* v. *Davy*, 31 Beav. 470.
(*x*) *Millett* v. *Davy*, *sup.*
(*y*) *Hood* v. *Easton*, 2 Giff. 692.

Act (*z*); and by 44 & 45 Vict. c. 41, ss. 19 and 23, this power is confirmed and regulated, the insurance money being limited, in the absence of stipulations to the contrary, to two-thirds the value of the property. In Ireland a mortgagee in possession with power of sale has the powers and responsibilities of a landlord, for the purposes of the Land Purchase Acts (*a*).

It is obvious that a mortgagee, if minded to enter into possession, has need to carefully consider the various obligations and responsibilities which he incurs, the more so that having assumed them he cannot at his pleasure relinquish them by yielding up the possession (*b*).

III. *Remedies of the Mortgagee.*

May sue for the debt,

1. In addition to his right to possession, a mortgagee has also, of course, a right at any time after payment of the debt has become due to sue the mortgagor for the money. Moreover, as it would be unjust that a mortgagee should be subject to a perpetual account by the perpetual continuance of the mortgagor's equity of redemption, he is allowed, after giving a reasonable notice for the payment of the debt, to come into equity and sue for the foreclosure of the equity of redemption; in other words, he may seek a decree which will give him the entire equitable as well as the legal interest in the property; or, in the alternative, he may seek the enforcement of a sale of the estate.

and for foreclosure or sale.

Attornment clause.

2. An additional remedy is sometimes provided for a mortgagee by the insertion in the mortgage deed of an attornment clause, that is, a proviso that in case default

(*z*) 23 & 24 Vict. c. 145, s. 11.
(*a*) 59 & 60 Vict. c. 47, s. 42.
(*b*) *Prytherch* v. *Williams*, 42 Ch. D. 590; 59 L. J. Ch. 79.

shall be made in payment of the mortgage debt, the mortgagor shall continue to remain in possession as a tenant of the mortgagee, paying a certain specified rent, usually the same in amount as the interest. This provision enables the mortgagee, if necessary, to utilise the special remedy provided for the recovery of rent by landlords; namely, distraint. Whether the rent reserved equals or exceeds the interest, the mortgagee has a *primâ facie* right to apply the proceeds of a distress in satisfaction of principal as well as interest (*c*). The rent reserved must, however, be of reasonable amount with regard to the value of the premises (*d*). If it is exorbitant, or the attornment is expressed only to come into operation on bankruptcy, it will be deemed a fraudulent preference and void (*e*). Moreover, an attornment clause needs registration under the Bills of Sale Acts, when the attornment is contained in the mortgage deed (*f*), though apparently not so when the mortgagee has taken possession and afterwards demised the premises to the mortgagor. Want of registration, however, does not prevent an attornment clause from creating the relation of landlord and tenant between the parties so as to enable the mortgagee to recover the land by summary process under R. S. C. Order III. r. 6 and Order XIV. r. 1 (*g*). But to avoid any risk of prejudice to the covenant for payment through non-registration, the better course is to effect the attornment by a separate instrument (*h*). The tenancy so created determines with the death of the mortgagor (*i*).

Distraint.

Rent must be reasonable,

not amounting to fraudulent preference.

(*c*) *Exp. Harrison*, 18 Ch. D. 127; 50 L. J. Ch. 832.

(*d*) *Re Stockton, &c. Co.*, 10 Ch. D. 335; *Exp. Voisey*, 21 Ch. D. 442; 52 L. J. Ch. 121.

(*e*) *Exp. Williams*, 7 Ch. D. 138; *Exp. Jackson*, 14 Ch. D. 725; and see *Exp. Isherwood*, 22 Ch. D. 384; 52 L. J. Ch. 370.

(*f*) *Re Willis*, 21 Q. B. D. 384; 57 L. J. Q. B. 634; *Green* v. *Marsh*, (1892) 2 Q. B. 330; 61 L. J. Q. B. 442.

(*g*) *Mumford* v. *Collier*, 25 Q. B. D. 279; 59 L. J. Q. B. 552; *Kemp* v. *Lester*, (1896) 2 Q. B. 162; 65 L. J. Q. B. 532.

(*h*) See *Davies* v. *Rees*, 17 Q. B. D. 408; 55 L. J. Q. B. 363; and a valuable note in Key & Elphinstone's Conveyancing Precedents, Vol. II. p. 50, ed. 5.

(*i*) *Scobie* v. *Collins*, (1895) 1 Q. B. 375; 64 L. J. Q. B. 10.

Action for foreclosure. Usual form.

3. When the mortgagor is in default (*j*) the legal remedy of the mortgagee on his covenant for payment of the mortgage debt, and his equitable remedy of foreclosure, may now be pursued in one action. If the mortgage debt and interest is proved, admitted, or agreed upon at the trial, the judgment is that the plaintiff do recover against the defendant the total sum of principal and interest, and so much of his costs (to be taxed) as would have been incurred if the action had been brought for payment only.

If the amount of the debt and interest is not so proved, admitted, or agreed, the Court directs an account of what is due to the plaintiff for principal and interest under the covenant contained in the mortgage, and orders that the plaintiff do recover against the defendant the amount which shall be certified to be due to him on taking such account, and also so much of his taxed costs as would have been incurred if the action had been brought for payment only.

In either of the two cases, the Court further orders an account of what is due to the plaintiff by virtue of his mortgage, and for his costs of the action (to be taxed), and directs that in taking such account anything the plaintiff shall have received from the defendant under the aforesaid judgment is to be deducted, and the balance due to the plaintiff to be certified (*k*).

One month is usually allowed for payment of what is proved or admitted to be due on the covenant (*k*). On the amount due on the security and for costs beyond this being certified, a further period is given for payment, and

(*j*) *Moore* v. *Shelley*, 8 App. Cas. 285; 52 L. J. P. C. 35.

(*k*) *Farrer* v. *Lacy, Hartland & Co.*, 31 Ch. D. 42; 55 L. J. Ch. 149. For a form of judgment when the debt is to be paid by instalments, see *Greenough* v. *Littler*, 15 Ch. D. 93. And where the mortgagee is in possession and receipt of rents, see *Jenner-Fust* v. *Needham*, 31 *ib.* 500; 32 *ib.* 582; 55 L. J. Ch. 629; *Simmons* v. *Blandy*, (1897) 1 Ch. 19; 66 L. J. Ch. 83; *Lynde* v. *Waithman*, (1895) 2 Q. B. 180; 64 L. J. Q. B. 762.

in default of payment the order for foreclosure is made, and, on being signed and enrolled, the foreclosure is complete, and the mortgagor's equity extinguished. Possession of the mortgaged premises may be decreed in the same action (*l*).

Where heir or devisee of mortgagor is an infant.

In the case of a foreclosure suit against an infant heir or devisee of the mortgagor, there is, with the mortgagee's consent, usually an inquiry whether foreclosure or sale would be more beneficial for the infant (*m*). If a sale appears beneficial, it may be decreed at once (*n*). If a foreclosure is decreed, the decree is binding on the infant, unless, on being served with a subpœna to show cause against the same, he shall, within six months after attaining his majority, show to the Court good cause to the contrary. This he must do by putting in a new defence, and showing error in the decree (*o*). An immediate foreclosure may be decreed against an infant, where the Court is of opinion that such a course is for his benefit (*p*). The same rule, however, does not apply to married women, against whom the ordinary procedure is employed, without a day being given to show cause (*q*).

Day to show cause.

Time may be enlarged after decree;

Even after a foreclosure has been absolutely decreed, signed and enrolled, the Court will show indulgence to the mortgagor by enlarging the time for payment, if a proper case can be shown, and the security be not deficient (*r*). There must, however, be a strong reason shown, and an immediate payment of interest and costs (*s*). A decree of foreclosure has been re-opened even after the mortgagee has been in possession sixteen years (*t*); but only under

or decree re-opened under special circumstances.

(*l*) *Keith* v. *Day*, 39 Ch. D. 452; 58 L. J. Ch. 118.

(*m*) *Mondey* v. *M.*, 1 V. & B. 223.

(*n*) *Davis* v. *Dowding*, 2 Keen, 245, 247.

(*o*) *Mallock* v. *Galton*, 3 P. Wms. 352; *Davis* v. *Dowding*, *sup.*; *Mellor* v. *Porter*, 25 Ch. D. 158; 53 L. J. Ch. 178.

(*p*) *Wolverhampton, &c. Bank* v. *George*, 24 Ch. D. 707.

(*q*) *Mallock* v. *Galton*, *sup.*

(*r*) *Thornhill* v. *Manning*, 1 Sim. N. S. 451; *Cocker* v. *Bevis*, 1 Ch. Ca. 61.

(*s*) *Coombe* v. *Stewart*, 13 Beav. 111.

(*t*) *Burgh* v. *Langton*, 5 Bro. P. C. 213.

special circumstances, such as fraud or collusion in obtaining the decree (*u*).

Power of sale and appointment of a receiver under 44 & 45 Vict. c. 41, incident to every mortgage.

4. The necessity for a foreclosure suit is generally obviated by the insertion of a power of sale in the mortgage deed; a power, however, which in no way prejudices the right to foreclosure (*x*). By Lord Cranworth's Act (*y*), a power of sale was rendered incident to every mortgage or charge by deed affecting any hereditaments of any tenure or any interest therein, executed after the 28th August, 1860. By 44 & 45 Vict. c. 41, ss. 19, 20, these powers have been confirmed. The power of sale, however, cannot be exercised until notice requiring payment of the mortgage money has been served on the mortgagor (*z*), and default has been made in payment thereof for three months after such service, *or* until some interest under the mortgage is in arrear and unpaid for two months after becoming due, *or* until there has been a breach of some provision contained in the mortgage or in this Act other than a covenant for payment of the mortgage money and interest. Under the previous Act, which still governs mortgages executed previously to the 1st of January, 1882, six months' notice in writing was required, and the power could not be exercised until the principal debt had been due a year, or the interest was in arrear six months. In both cases the powers in question may be excluded by express stipulation.

The only obligation on a mortgagee selling under his statutory power of sale, or under an express power of sale such as is commonly contained in mortgage deeds, is that he shall act in good faith. A *bonâ fide* sale to the mortgagor was thus sustained (*a*). Where a mortgagee exercising his power of sale in effect purchased the property himself and afterwards sold the property, it was held that

(*u*) *Loyd* v. *Mansel*, 2 P. Wms. 73.
(*x*) *Slade* v. *Rigg*, 3 Ha. 35.
(*y*) 23 & 24 Vict. c. 145, ss. 11—16.
(*z*) See *Hoole* v. *Smith*, 17 Ch. D. 434; 50 L. J. Ch. 576.
(*a*) *Kennedy* v. *De Trafford*, (1896) 1 Ch. 762; (1897) A. C. 180; 66 L. J. Ch. 483.

the transaction being untainted with fraud the right of redemption was extinguished by the second sale, and that the purchaser was under no obligation to give notice to the mortgagor or to see to the application of the purchase money (*b*), for which, of course, the mortgagee is accountable. Any surplus money on a sale, after the discharge of the principal debt, interest and costs, is held by the mortgagee as trustee for the person or persons previously entitled to redeem, that is, subsequent incumbrancers or the mortgagor as the case may be. The trust, however, is constructive, and in the absence of fraud is subject to the Statute of Limitations (*c*).

In the absence of an express condition to that effect, notice of sale need not be given to the mortgagor, nor is his concurrence necessary to perfect the purchaser's title. But where notice is required, although a purchaser may be exonerated from making inquiry as to this or otherwise as to the circumstances giving rise to the power of sale, this does not preclude the purchaser from refusing the title where he has express notice that the terms of the power have not in fact been complied with (*d*).

Sale by the Court.

5. By the Chancery Amendment Act (*e*), the Court of Chancery was empowered in any case to direct a sale of the mortgaged property instead of foreclosure on such terms as it might think fit. And under that Act a sale was usually directed where there was such complication of interests that a common foreclosure decree could not be conveniently worked, or it was on other grounds manifestly for the benefit of the parties (*f*). This Act has now been repealed in this respect, and replaced by the more com-

(*b*) *Henderson* v. *Astwood*, (1894) A. C. 150; and see *Bailey* v. *Barnes*, (1894) 1 Ch. 25; 63 L. J. Ch. 73.

(*c*) *Thorne* v. *Heard*, (1895) A. C. 495; 64 L. J. Ch. 652; *Warner* v. *Jacob*, 20 Ch. D. 220; 51 L. J. Ch. 642.

(*d*) *Dicker* v. *Angerstein*, 3 Ch. D. 600; *Selwyn* v. *Garfitt*, 38 *ib.* 273; 57 L. J. Ch. 609; *Life, &c. Corp.* v. *Hand in Hand Soc.*, (1898) 2 Ch. 130; 67 L. J. Ch. 548.

(*e*) 15 & 16 Vict. c. 86.

(*f*) *Hurst* v. *H.*, 16 Beav. 372; *Newman* v. *Selfe*, 33 *ib.* 522.

prehensive provisions of the Conveyancing Act, 1881 (*g*). By s. 25 of this statute, it is provided (1) that any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative; (2) that in any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and without allowing any time for redemption or payment of any mortgage money, may direct a sale of the mortgaged property on such terms as it thinks fit; and this without previously determining the priorities of incumbrancers. 44 & 45 Vict. c. 41, s. 25.

Under this section the Court has jurisdiction to order a sale at any time before the foreclosure has become absolute (*h*), and may do so on an interlocutory application (*i*). The Court will take into consideration the amount of the mortgage debt and the circumstances of the case generally, in the exercise of its judicial discretion (*k*).

Receiver and manager.

6. Again, a mortgagee has a further remedy in the power to require the appointment of a receiver of the rents and profits of the mortgaged property, when the mortgage money has become due (*l*). The powers and duties of the receiver are specified in s. 24 of the Act. Before action brought the receiver may be appointed by the mortgagee; but afterwards application should be made to the Court for the purpose (*m*). A mortgagee is not entitled to make

(*g*) 44 & 45 Vict. c. 41.

(*h*) *Union Bank* v. *Ingram*, 20 Ch. D. 463; 51 L. J. Ch. 508.

(*i*) *Woolley* v. *Coleman*, 21 Ch. D. 169; 51 L. J. Ch. 854.

(*k*) *Wade* v. *Wilson*, 22 Ch. D. 235; 52 L. J. Ch. 399; *Merchant Bkg. Co.* v. *London and Hanseatic Bank*, 55 L. J. Ch. 479; *Brewer* v. *Square*, (1892) 2 Ch. 111; 61 L. J. Ch. 516.

(*l*) 44 & 45 Vict. c. 41, ss. 19 (iii.), 24.

(*m*) *Tillett* v. *Nixon*, 25 Ch. D.

any charge for his personal trouble in respect of the mortgage, and he may not appoint himself receiver, even though there be an express agreement with the mortgagor to that intent (*n*). The powers of a receiver are limited to the property mortgaged. Thus, if land only be mortgaged, but a business there carried on is not included in the security, the receiver has no power to manage the business (*o*), and will not be appointed manager unless it is necessary for the protection of the security that the business should be carried on (*p*). It is otherwise where the business itself is part of the mortgaged property (*q*).

Remedies may be pursued concurrently.

7. The general rule of equity was, formerly, that a party suing at law could not sue in equity at the same time. A mortgagee has, however, always been permitted to pursue all his remedies at the same time. He may at once eject the mortgagor, sue on the covenant for payment in his deed, and on a bond given as a collateral security, and also proceed in equity for foreclosure or sale; and this, we have seen, in the same action. If he obtains full payment on the bond or covenant, or by receipt of the rents and profits, the mortgagor is entitled to redeem the estate, and there can be no foreclosure or sale; but if only partially paid, he may still go on and foreclose (*r*).

But action for payment after foreclosure re-opens the foreclosure, and cannot be brought unless mortgagee can still convey the estate.

If he first sues for foreclosure, and afterwards sues for payment on his covenant, the effect of such personal action is to re-open the foreclosure, and give the mortgagor a renewed right to redeem. If the mortgagee still has the estate in his power, there is no objection to his action; only on payment of the whole debt he must reconvey the estate to the mortgagor. If, on the contrary, he has so

238; 53 L. J. Ch. 199; *Mason* v. *Westoby*, 32 Ch. D. 206; 55 L. J. Ch. 507.

(*n*) *French* v. *Baron*, 2 Atk. 120.

(*o*) *Whitley* v. *Challis*, (1892) 1 Ch. 64; 61 L. J. Ch. 307.

(*p*) *Campbell* v. *Lloyd's Bank*, (1891) 1 Ch. 136, n.; *Makins* v. *Ibotson*, *ib.* 133; 60 L. J. Ch. 164.

(*q*) *Gloucester Bank* v. *Rudry, &c. Colliery*, (1895) 1 Ch. 629; 64 L. J. Ch. 451; *Lilley* v. *Foad*, (1899) 2 Ch. 107; 68 L. J. Ch. 517.

(*r*) *Palmer* v. *Hendrie*, 27 Beav. 349, 351.

dealt with the mortgaged estate as to be unable to restore it on tender of full payment—for instance, if he has sold it—he can no longer sue for the mortgage money (*s*). Hence it is evident that his best course is to proceed in one action to enforce all his remedies, or first to pursue his legal remedies, and then to have recourse, if necessary, to those of equity. A mortgagor remains liable under his covenant, even after he has assigned his equity of redemption. If the mortgagee sues on the covenant, and the mortgagor pays the mortgage debt, he is thereupon entitled to a reconveyance of the mortgaged premises. If in the meantime the assignee of the equity of redemption has made a second mortgage, the original mortgagor thus obtains a security for his payment, standing, in fact, in the place of the first mortgagee (*t*).

Dismissal of redemption action operates as foreclosure of legal,

8. If a mortgagor sues for redemption of a *legal* mortgage, and the action is dismissed for any reason except for want of prosecution, the dismissal operates as a decree of foreclosure against him. The action admits the debt and admits the mortgagee's title; being dismissed, he cannot again sue for the same object, and the result is in effect foreclosure (*u*). The dismissal, however, of the similar action respecting an equitable mortgage would not have the same effect (*u*).

but not of an equitable mortgage.

Limitation.

9. The following limitations affect the remedies of the mortgagee:—

3 & 4 Will. IV. c. 27, s. 40.

By 3 & 4 Will. IV. c. 27, the right of a mortgagee to foreclosure was limited to a period of twenty years from the time of the last payment or demand of interest, or an acknowledgment of the mortgage on the part of the mortgagor or his representative or agent. This statute has now been replaced by the Real Property Amendment Act,

37 & 38 Vict. c. 57.

(*s*) *Lockhart* v. *Hardy*, 9 Beav. 349; *Palmer* v. *Hendrie*, *sup.*; 28 Beav. 341.

(*t*) *Kinnaird* v. *Trollope*, 39 Ch. D. 636; 57 L. J. Ch. 905.

(*u*) *Marshall* v. *Shrewsbury*, 10 Ch. 250.

1874 (*x*), s. 8 of which enacts that "no action or suit or "other proceeding shall be brought to recover any sum of "money secured by any mortgage, judgment, or lien, or "otherwise charged upon or payable out of any land or "rent at law or in equity, or any legacy, but within "*twelve* years next after a present right to receive the "same shall have accrued to some person capable of giving "a discharge for or release of the same, unless in the "meantime some part of the principal money or some "interest thereon shall have been paid, or some acknow-"ledgment of the right thereto shall have been given in "writing, signed by the person by whom the same shall "be payable, or his agent, to the person entitled thereto "or his agent; and in such case no such action or suit or "proceeding shall be brought but within twelve years after "such payment or acknowledgment, or the last of such "payments or acknowledgments, if more than one, was "given." The effect of the statutes is to bar the mortgagee's title as well as his remedy, so that a subsequent mortgage carries the legal estate to the mortgagee (*y*).

3 & 4 Will. IV. c. 27, s. 42.

Again, s. 42 of 3 & 4 Will. IV. c. 27, provides that no rent or interest in respect of any sum of money charged upon land or rent shall be recovered by any distress or action but within six years next after the same shall have become due, or shall have been formally acknowledged by the debtor or his agent. In case, however, of the sale of the property by a mortgagee, he may retain more than six years' arrears of interest out of the proceeds (*z*).

3 & 4 Will. IV. c. 42.

And by 3 & 4 Will. IV. c. 42, it is enacted that all actions of covenant or debt upon any bond or specialty shall be sued and brought within twenty years after the cause of such actions and suits, or within twenty years after an acknowledgment by deed, or part payment, or part satisfaction.

(*x*) 37 & 38 Vict. c. 57.

(*y*) *Kibble* v. *Fairthorne*, (1895) 1 Ch. 219; 64 L. J. Ch. 184.

(*z*) *Marshfield* v. *Hutchens*, 34 Ch. D. 721; 56 L. J. Ch. 599; *Mellersh* v. *Brown*, 45 Ch. D. 225.

Effect of the statutes.

These limitations remain unaffected by the more recent statute. The result is, that an action for the recovery of a mortgage debt must be brought within twelve years from the accruing of the right, or of an acknowledgment or payment on account thereof (*a*); an action for foreclosure must be brought within the same period (*b*); and an action for arrears of rent or interest within a period of six years. If, moreover, there is the additional security of a bond or covenant, the period of limitation of the personal remedy thereunder is, under the recent statute, twelve years only (*c*), and this whether the covenant is contained in the mortgage itself, or in a collateral instrument (*d*). But the period of twenty years fixed by 3 & 4 Will. IV. c. 42, has been held still to apply in the case of a collateral bond given by a surety to secure the mortgage debt (*e*), and in the case of a surety, the statute begins to run not from the time when the debt becomes due, but from the time of the demand of payment (*f*). The mere fact that a simple contract debt is charged on land, does not extend the remedy to twelve years; the debt becomes barred in six years (*g*). In a mortgage of a reversionary interest the statute only begins to run when the interest falls into possession (*h*).

It must be observed that a payment of rent, in order to keep alive a mortgagee's right of foreclosure, must be made with the knowledge of the mortgagor, or subsequently adopted by him (*i*).

The allowance of ten years in the period of limitation in favour of persons under disability by reason of infancy,

(*a*) See *Pugh* v. *Heath*, 7 App. Cas. 235; 51 L. J. Q. B. 367.

(*b*) *Harlock* v. *Ashberry*, 19 Ch. D. 539, reversing 18 *ib.* 229; 51 L. J. Ch. 394.

(*c*) *Sutton* v. *S.*, 22 Ch. D. 511; 52 L. J. Ch. 333.

(*d*) *Fearnside* v. *Flint*, 22 Ch. D. 579; 52 L. J. Ch. 479.

(*e*) *Lindsell* v. *Phillips*, 30 Ch. D. 291; *Allison* v. *Frisby*, 43 Ch. D. 106; 59 L. J. Ch. 94.

(*f*) *Brown* v. *B.*, (1893) 2 Ch. 300; 62 L. J. Ch. 695.

(*g*) *Barnes* v. *Glenton*, (1899) 1 Q. B. 885, reversing (1898) 2 Q. B. 223; 68 L. J. Q. B. 502.

(*h*) *Hugill* v. *Wilkinson*, 38 Ch. D. 480; 57 L. J. Ch. 1019.

(*i*) *Harlock* v. *Ashberry*, *sup.*; *Newbould* v. *Smith*, 29 Ch. D. 882; 33 *ib.* 127; 55 L. J. Ch. 788.

coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, from the termination of the disability, or from death (*k*), is not applicable as between mortgagor and mortgagee (*l*).

Trust term for payment formerly excepted from limitation.

Formerly, if a trust term was created or agreed to be assigned for securing the payment of principal and interest, express trusts being excepted from the Statute of Limitation, the amount of arrears recoverable was not limited to six years; nor was an action for the principal limited to twenty years (*m*). But by s. 10 of 37 & 38 Vict. c. 57, this effect of the security of an express trust was removed, and in such a case the limitation as against the land is now the same as if there were no trust (*n*); and the trustee in the absence of fraud or fraudulent breach of trust is protected by the Trustee Act, 1888, s. 8 (*o*).

IV. *Tacking of Mortgages.*

The case usually cited as the leading authority on the doctrine of tacking is *Marsh* v. *Lee* (*p*).

In this case one English being seised of the manor of Wicksall, and of the manor of Monfield, mortgaged, in 1649, part of the manor of Wicksall to Burrell for £1,000. Afterwards, in 1655, he acknowledged a statute to Burrell of £800 for the payment of £400. In 1662 English mortgaged both the manors to Mrs. Duppa for £7,000. In 1665 English mortgaged the manor of Wicksall to Lee for £7,000. Lee had no notice of the former mort-

(*k*) 3 & 4 Will. IV. c. 27, s. 16.
(*l*) *Kinsman* v. *Rouse*, 17 Ch. D. 104; 50 L. J. Ch. 486; *Forster* v. *Patterson*, 17 Ch. D. 132; 50 L. J. Ch. 603.
(*m*) *Cox* v. *Dolman*, 2 De G. M. & G. 592.
(*n*) See *Banner* v. *Berridge*, 18 Ch. D. 254; 50 L. J. Ch. 630; *Swain* v. *Bringeman*, (1891) 3 Ch. 233; 61 L. J. Ch. 20.
(*o*) 51 & 52 Vict. c. 59.
(*p*) 2 Ventr. 337; 1 W. & T. L. C. 659.

gages, but he subsequently purchased Burrell's incumbrances.

The Lord Keeper Bridgeman, assisted by Hale, C. B., and Rainsford, J., held that Lee might make use of these incumbrances to protect his own mortgage, for that he had both law and equity on his side. He had *law*, for that he had a precedent mortgage in 1649, and also the statute in 1655; so that, while these remained in force, Marsh could not come in. He had *equity*, for he having a subsequent mortgage, yet it being without notice, he ought to be relieved in this Court.

Principle of tacking.

The doctrine of tacking rests upon and illustrates two familiar maxims of equity—(1.) "*He who seeks equity must do equity*": (2.) "*Where equities are equal the law shall prevail.*" It is equity that a debtor who has received a loan on the security of an estate shall, when he seeks to redeem his estate, pay all the debts which he owes to his creditor. If in the meantime the debtor has borrowed money from other persons on the same security, and the first creditor having the legal estate therein has subsequently without notice made further advances to the debtor, he has law and equity on his side, and may tack his subsequent advance to his original debt, notwithstanding that it may happen to prejudice an intermediate incumbrancer who has only an equitable security. Further, if a person lends his money only upon an equitable security, but without notice of any prior charge, he may, after receiving notice of such a charge, protect his security by purchasing the legal estate from a first incumbrancer; his loan without notice giving him an equal equity, and his securing the legal estate giving him a preference at law. The subject naturally resolves itself into two inquiries: first, as to the principles of tacking as against the mortgagor and his representatives; secondly, as to the principles of tacking as against *mesne* or intermediate incumbrancers.

1. Tacking as against the mortgagor and his representatives.

Mortgagor on redemption must pay principal, interest, and costs.

A mortgagor must, before redemption, pay not merely the principal and interest of the mortgage debt, but also all the proper costs incurred by the mortgagee. And these costs include not only his costs of suits for redemption or foreclosure, taxed as between party and party (*q*),

What costs included.

but all costs necessarily incurred by the mortgagee in maintaining the title to the estate (*r*), and generally those costs to which we have above seen that he is entitled in his accounts (*s*).

Mortgagee may even have to pay costs.

A mortgagee may, however, not only be refused his costs, but may even have to pay the costs of the mortgagor if he has necessitated a suit by refusing a tender of the full amount due (*t*), or by setting up a groundless defence (*u*), or has otherwise been guilty of vexatious conduct (*x*). Mere mistake, however, where his conduct has been in good faith is not sufficient to deprive him of costs (*y*).

Mortgagor must pay all debts forming a specific lien on land.

Again, the mortgagee cannot be deprived of his pledge without payment of all sums of money due to him from his debtor which form a general or specific lien on the land; if, therefore, the mortgagee advance money by way of further charge or on a judgment, neither the mortgagor, nor, as a rule, anyone claiming under him, though for valuable consideration and without notice, can redeem without payment of the full amount (*z*). And equitable liens and charges may, equally with legal ones, be thus tacked to the original mortgage debt; for instance, an agreement for a mortgage, or an informal mortgage (*a*).

Equitable as well as legal.

As against the mortgagor

The test as to the application of the doctrine of tacking,

(*q*) *The Kestril*, L. R. 1 A. & E. 8.
(*r*) *Godfrey* v. *Watson*, 3 Atk. 518.
(*s*) *Supra*, p. 283.
(*t*) *Roberts* v. *Williams*, 4 Ha. 129.
(*u*) *Harvey* v. *Jebbutt*, 1 J. & W. 197.
(*x*) *Moore* v. *Painter*, 6 Jur. 903.
(*y*) *Smith* v. *Watts*, 22 Ch. D. 12; 52 L. J. Ch. 209; *Bird* v. *Wenn*, 33 Ch. D. 219; 55 L. J. Ch. 722.
(*z*) Coote, 878, ed. 5.
(*a*) *Matthews* v. *Cartwright*, 2 Atk. 347.

as against the mortgagor, is whether the further advance was made on the security of the land. If so it may be tacked; if not, as against the mortgagor it cannot (*b*). Thus, though under a covenant in his mortgage, a mortgagor might, by virtue of 3 & 4 Will. IV. c. 42, have recovered twenty years' interest, yet since by 3 & 4 Will. IV. c. 27, he was only entitled to six years' arrears against the land, he could not tack more than this against the mortgagor, for the covenant creates no lien upon the land (*c*). On the same principle a bond debt, and *à fortiori* a simple contract debt, cannot be tacked as against a mortgagor (*d*).

the question is: Was the further advance made on security of the land?

Only six years' interest can be tacked.

Not bond or simple contract debts.

But as against the representatives of a mortgagor the case rests on a different principle. Thus in the case of a bond debt, whether prior or subsequent to the mortgage, the heir and beneficial devisee of the debtor having been made, by 3 & 4 Will. & M. c. 14, jointly liable for its payment, in order to avoid circuity and multiplicity of actions, the bond debt was allowed to be tacked to the mortgage as against them (*e*). And on the same principle twelve years' arrears of interest may be tacked as against the heir or devisee of the mortgagor, if secured by a covenant in the mortgage deed binding the heirs (*f*), though only six years' arrears could be tacked as against the mortgagor himself.

Secus as against mortgagor's representatives.

Against them all debts may be tacked.

Again, since 3 & 4 Will. IV. c. 104, which made real estate liable to simple contract debts, such debts may be tacked by any mortgagee of freehold or copyhold against the heir or devisee, in any cases in which there is not a devise for payment of debts (*g*). And similarly a mortgagee of a lease may tack a simple contract debt against

(*b*) *Lacy* v. *Ingle*, 2 Ph. 413.
(*c*) *Hunter* v. *Nockolds*, 1 Mac. & G. 640.
(*d*) *Coleman* v. *Winch*, 1 P. Wms. 777; *Jones* v. *Smith*, 2 Ves. jr. 376.
(*e*) *Heams* v. *Bance*, 3 Atk. 630; *Shuttleworth* v. *Laycock*, 1 Vern. 245; *Christison* v. *Bolam*, 36 Ch. D. 223; 57 L. J. Ch. 221.
(*f*) *Elvy* v. *Norwood*, 5 De G. & S. 240.
(*g*) *Rolfe* v. *Chester*, 20 Beav. 610.

the executor (*h*). But in neither case can either a bond or a simple contract debt be tacked as against a *creditor coming to redeem* (*i*).

2. Tacking as against mesne incumbrancers.

In this branch of the subject perhaps the most important authority that can be cited is the well-known case of *Brace* v. *The Duchess of Marlborough* (*k*), in which Sir Joseph Jekyll, M. R., laid down the following series of rules in exposition of the whole doctrine :—

Rules in *Brace* v. *Duchess of Marlborough*.

1. Third mortgagee purchasing first mortgage may tack.

(1.) "If a third mortgagee buys in the first mortgage, "though it be *pendente lite*, pending a bill brought by the "second mortgagee to redeem the first, yet the third mort- "gagee having obtained the first mortgage and got the "law on his side and equal equity, he shall thereby "squeeze out the second mortgagee; and this Lord Chief "Justice Hale called a plank gained by the third mort- "gagee, or a *tabula in naufragio*, which constitution is in "favour of a purchaser, every mortgagee being such *pro* "*tanto*" (*l*).

A fortiori first mortgagee making further advance without notice may tack; but creditor must hold both securities in the same right.

This rule is that established by the earlier case of *Marsh* v. *Lee* (*m*), and includes the stronger case of a first and legal mortgagee making a further advance without notice of a second mortgage. There are certain limitations of the rule which require attention. Thus, there can be no tacking unless both the securities are held by the creditor in the same right. He cannot tack a mortgage which he holds for his own benefit to one assigned to him as trustee for another person (*n*). Similarly the executor of a first mortgagee who had the legal estate in his own right, was not suffered as against a *mesne* incumbrancer to tack a

(*h*) *Coleman* v. *Winch*, 1 P. Wms. 777; *In re Haselfoot's Estate*, 13 Eq. 327.

(*i*) *Adams* v. *Claxton*, 6 Ves. 226; *Talbot* v. *Frere*, 9 Ch. D. 568.

(*k*) 2 P. Wms. 491.

(*l*) And see *London & County Bank* v. *Goddard*, (1897) 1 Ch. 642; 66 L. J. Ch. 261.

(*m*) 2 Ventr. 337.

(*n*) *Morret* v. *Paske*, 2 Atk. 52; *Shaw* v. *Neale*, 6 H. L. 581.

mortgage of the equity of redemption which had vested in his testator as executor of another.

No priority can be gained by the transfer of the legal estate by a person who holds it on an express trust for the first incumbrancer. The purchaser, in such a case, himself becomes a trustee (*o*). Similarly an incumbrancer getting in the legal estate from a person who is trustee for all the incumbrancers, with notice of their rights, gains no priority. The trustee is not to alter the priorities by preferring one of his *cestui que trusts* and conveying the legal estate to him (*p*). On the same principle it has been held that no priority is gained by the transfer, with notice of other incumbrances, of a satisfied mortgage, the legal mortgagee becoming on payment of his debt a mere trustee without any pecuniary interest (*q*); but in some circumstances the Court has refused to interfere to take away the privilege of the legal estate (*r*). It is clearly settled that notice given to the first mortgagee by the second, will not prevent the third mortgagee from tacking the third mortgage to the first if he purchases it (*s*).

Conveyance of legal estate by express trustee does not give priority.

Nor does transfer of a satisfied mortgage.

Notice by second mortgagee to first does not prevent tacking by the third mortgagee.

(2.) The second rule is, "If a judgment creditor, or "creditor by statute or recognizance, buys in the first "mortgage, he shall not tack or unite the mortgage to his "judgment, &c., and thereby gain a preference; for such "a creditor cannot be called a purchaser, nor has he any "right to the land; he has neither a *jus in re* nor a *jus ad* "*rem*. All that he has by the judgment is a lien upon "the land, but *non constat* whether he will ever make use "thereof, &c. Besides which the judgment creditor does "not lend his money on the immediate view or contempla-"tion of the land, nor is he deceived or defrauded though

2. Judgment creditor cannot tack a mortgage to his judgment, the first sum not being lent on the security of the land.

(*o*) *Allen* v. *Knight*, 5 Ha. 272; *Mumford* v. *Stohwasser*, 18 Eq. 556, 563; *Taylor* v. *L. & C. Bank*, (1901) 2 Ch. 231; 70 L. J. Ch. 477.

(*p*) *Sharples* v. *Adams*, 32 Beav. 213; *Maxfield* v. *Burton*, 17 Eq. 15; *Union Bank* v. *Kent*, 39 Ch. D. 238; 57 L. J. Ch. 1022; *Carritt* v. *R. & P. Advance Co.*, 42 Ch. D. 263; 58 L. J. Ch. 688.

(*q*) *Carter* v. *C.*, 3 K. & J. 617; *Prosser* v. *Rice*, 28 Beav. 68, 74.

(*r*) *Pilcher* v. *Rawlins*, 7 Ch. 259, 274; and see p. 336, *inf.*

(*s*) *Peacock* v. *Burt*, 4 L. J. N. S. Ch. 33.

"his debtor had before made twenty mortgages of his "estate; whereas a mortgagee is defrauded or deceived if "the mortgagor before that time mortgaged his land to "another."

The distinction here drawn between the specific lien of a mortgagee and the general lien of a judgment creditor, as regards tacking, seems to be sound in principle, and is well established (*t*); it has not been affected by 1 & 2 Vict. c. 110 (*u*). Since 27 & 28 Vict. c. 112, the land is not affected by a judgment, and no right to tack could be supposed to arise, until the land is delivered in execution by writ of *elegit* or otherwise; and when there has been actual delivery, even a prior *mortgagee*, though without notice of the *elegit*, could not tack a subsequent charge to his first mortgage (*x*).

The rule would seem to apply equally to prevent a prior judgment creditor from tacking a subsequent incumbrance, and to prevent a subsequent judgment creditor from tacking a prior incumbrance (*y*).

3. A mortgagee may tack a judgment to his mortgage.

(3.) The third rule is that if the first mortgagee lends (*without notice*) a further sum to the mortgagor upon a statute or judgment, he shall retain against a *mesne* mortgagee until both his securities are satisfied.

This is the converse of the last rule, and is supported by the converse of the reasoning there employed, for in this case the mortgagee *does originally lend his money especially upon the security of the land*, and may be considered to rely thereupon for all his debt (*z*). If, however, the mortgage is paid off before the judgment is recovered, although no

Unless the mortgage has been satisfied.

(*t*) *Exp. Knott*, 11 Ves. 617.

(*u*) *Whitworth* v. *Gaugain*, 3 Ha. 416; see *Exp. Whitehouse*, 32 Ch. D. 512; 55 L. J. Ch. 608; *Badeley* v. *Consol. Bank*, 34 Ch. D. 536; 38 Ch. D. 238; 57 L. J. Ch. 468; *Davis* v. *Freethy*, 24 Q. B. D. 519; 57 L. J. Q. B. 318.

(*x*) *Champneys* v. *Burland*, 19 W. R. 148; *Hood-Barrs* v. *Cathcart*, (1895) 2 Ch. 411; 64 L. J. Ch. 461.

(*y*) Coote, 891, ed. 5.

(*z*) See also *Shepherd* v. *Titley*, 2 Atk. 348, 352; *Lloyd* v. *Atwood*, 3 De G. & J. 614.

reconveyance may have been made, the judgment cannot be tacked (*a*).

In these cases tacking prevented by notice.

It will be observed that in all these cases there is no right to tack if at the time of advancing his money the mortgagee *had notice of an existing incumbrance.* It is the same in the case of a third mortgagee purchasing the first legal mortgage, and in the case of a first mortgagee seeking to tack a further advance, even if the first mortgage was expressly made to secure a sum and further advances (*b*), and contained a covenant to that effect (*c*). Thus a first mortgagee cannot tack a subsequent debt incurred *pendente lite* (the *lis pendens* being duly registered), because the suit would affect him with notice of the *mesne* incumbrance (*d*). Notice to one of a number of joint mortgagees is sufficient to prevent tacking of a further advance made by the others (*e*). The fact is that if there is notice at the time of the advance the *equities are not equal;* and then the possession of the legal estate will not prevail.

4. Where the legal estate is outstanding the priority follows the order of time,

(4.) The last rule in *Brace* v. *The Duchess of Marlborough* is: "When a *puisne* incumbrancer buys in a prior "mortgage in order to unite the same to the *puisne* incum- "brance, but it is proved that there was a mortgage prior "to that, the Court clearly holds that the *puisne* incum- "brancer where he had not got the legal estate, or where "the legal estate was vested in a trustee, could there make "no advantage of his mortgage; but in all cases where the "legal estate is standing out, the several incumbrancers "must be paid according to their priority in point of time." In other words, where, owing to the outstanding of the legal estate, the maxim "*where there is equal equity the law*

(*a*) *Marquis of Brecon* v. *Seymour*, 26 Beav. 548.

(*b*) *Rolt* v. *Hopkinson*, 9 H. L. 514; *Shaw* v. *Neale*, 20 Beav. 157; 6 H. L. 581; *Carlisle Bank* v. *Thompson*, 28 Ch. D. 398.

(*c*) *West* v. *Williams*, (1899) 1 Ch. 132; 68 L. J. Ch. 127; reversing (1898) 1 Ch. 488.

(*d*) *Morret* v. *Paske*, 2 Atk. 53; and see *Credland* v. *Potter*, 10 Ch. 8.

(*e*) *Freeman* v. *Laing*, (1899) 2 Ch. 355; 68 L. J. Ch. 586.

"*must prevail*" does not apply, then the maxim "*qui prior* "*est tempore potior est jure*" applies (*f*).

unless one incumbrancer has a better right to call for it.

There is, however, a modification of this rule when one of the incumbrancers, though he has not the legal estate, has from the circumstances of the case a better right to call for it than another; for instance, if a declaration of trust has been made in his favour, or if he has secured possession of the title deeds (*g*). If this is the case, equity will place him in the same situation as if he had an actual assignment (*h*). And the result is the same where an incumbrancer obtains the legal estate after advancing his money in pursuance of a contract for a legal mortgage entered into at the time of the advance (*i*).

Bond and simple contract debts not tacked against a *mesne* incumbrancer.

We have seen that bond and simple contract debts, not being specific liens on the land, cannot be tacked as against the mortgagor himself. *A fortiori*, whether prior or subsequent to the mortgage, they cannot be tacked as against any intervening incumbrancer, whether a mortgagee or judgment or bond creditor (*k*).

37 & 38 Vict. c. 78.

The whole doctrine of tacking was displaced for a short time by the Vendor and Purchaser Act, 1874 (*l*), which enacted that from the 7th of August, 1874, no priority should be given or allowed to any interest in land by reason of such interest being protected by or tacked to the legal estate in such land. This enactment was, however, only in operation until the 31st of December, 1875, from

38 & 39 Vict. c. 87.

which time it was repealed by the Land Transfer Act, 1875 (*m*).

By the Yorkshire Registries Act, 1884, provision is made for the registration of all mortgages of lands in Yorkshire, and registration is declared to constitute

(*f*) *Union Bank* v. *Kent*, 39 Ch. D. 238; 57 L. J. Ch. 1022.

(*g*) *Wyndham* v. *Richardson*, 2 Ch. Ca. 213.

(*h*) *Pomfret* v. *Windsor*, 2 Ves. sr. 472, 486; *Wilmot* v. *Pike*, 5 Ha. 14, 22.

(*i*) *Cooke* v. *Wilton*, 29 Beav. 100.

(*k*) *Windham* v. *Jennings*, 2 Ch. Rep. 247; *Lowthian* v. *Hasel*, 3 Bro. C. C. 162.

(*l*) 37 & 38 Vict. c. 78.

(*m*) 38 & 39 Vict. c. 87.

actual notice of such mortgages. The Act further provides that registered assurances thereunder shall have priority according to their respective dates of registration, and that priority shall not be gained by an application of the doctrine of tacking (*n*). But this is subject to the exception that priority will not be gained by registration if the advance is obtained by actual fraud (*o*).

V. *Consolidation of Mortgages.*

Consolidation distinguished from tacking.

1. The doctrine of the consolidation of mortgages must be carefully distinguished from that of tacking. The principle of tacking applies as between successive incumbrances on one estate. The term consolidation of mortgages is applied to the general rule that where a mortgagor has mortgaged more than one estate to his mortgagee, he cannot claim to redeem one mortgage without redeeming all. This rule, which applies equally to redemption and foreclosure suits, to legal and equitable mortgages, and to real and personal property, may be thus concretely illustrated: A. mortgages Blackacre to B. for £1000, Blackacre being worth say £1500. Then A. further mortgages Whiteacre to B. for £500, and Whiteacre is found to be worth only £100. A. cannot then claim to redeem Blackacre, where the security is ample, alone. If he seeks to do so, he must also be prepared to redeem Whiteacre, which is an insufficient security for the money originally charged upon it (*p*). The fact that the mortgagee has given notice to the mortgagor to pay off one of the mortgages does not prejudice his right to consolidate (*q*).

Illustration.

(*n*) 47 & 48 Vict. c. 54; 48 Vict. c. 4; 48 & 49 Vict. c. 26.

(*o*) *Battison* v. *Hobson*, (1896) 2 Ch. 403; 65 L. J. Ch. 695.

(*p*) *Selby* v. *Pomfret*, 1 J. & H. 336; 3 De G. F. & J. 595; *Phillips* v. *Gutteridge*, 4 De G. & J. 531.

(*q*) *Griffith* v. *Pound*, 45 Ch. D. 553; 59 L. J. Ch. 522.

Effect of notice.

2. And this doctrine of consolidation has been carried far beyond the simple case of a mortgage of two estates by one person to another. Thus, if A. sells Blackacre, or mortgages the equity of redemption of it to C., whether with or without notice of the existence of the other mortgage, the purchaser is just as much as A. himself bound by B.'s right to consolidate (*r*). Even where the mortgage of Whiteacre was effected after the sale or second mortgage to C., B. was held entitled to consolidate (*s*). That this may work great hardship on a second mortgagee or purchaser is very evident. Thus, referring again to the figures above employed in illustration, C., not having any notice of the improvident mortgage of Whiteacre, may imagine that he is perfectly secure in giving £400 for, or lending it on a second mortgage of Blackacre. He would clearly be so if that estate could be redeemed alone. But he finds on seeking to do this, that B. can consolidate with the mortgage of Blackacre the mortgage of Whiteacre, which is worth £400 less than what was lent thereupon; and the result is that C.'s purchase or security is worth nothing at all.

First mortgages made to different persons.

Again, the principle applies although the first mortgages of the several estates were originally made to different mortgagees, but have by transfer come into the hands of one mortgagee; for instance, if A. mortgages Blackacre to B., and Whiteacre to C., and C. afterwards assigns his mortgage to B. (*t*), or, *vice versâ*, B. assigns his mortgage to C. (*u*). But it has been held that consolidation cannot be insisted on if the equity of redemption of the one estate has been sold or mortgaged previous to the transfer which brings the two mortgages to the same hand (*x*): *à fortiori*,

(*r*) *Beevor* v. *Luck*, 4 Eq. 537; *Titley* v. *Davies*, 2 Y. & C. Ch. 399, n.

(*s*) *Vint* v. *Padget*, 1 Giff. 446; 2 De G. & J. 611; *Pledge* v. *White*, (1896) A. C. 187; 65 L. J. Ch. 449.

(*t*) *Tweedale* v. *T.*, 23 Beav. 341.

(*u*) *Titley* v. *Davies*, *sup.*

(*x*) *Willie* v. *Lugg*, 2 Ed. 78; *Harter* v. *Colman*, 19 Ch. D. 630; 51 L. J. Ch. 481; *Minter* v. *Carr*, (1894) 2 Ch. 321; 3 Ch. 498; 63 L. J. Ch. 705.

if such sale or mortgage takes place previous to the creation of the mortgage of the other estate (*y*). In this case the knowledge of the possibility of the mortgages coalescing cannot be imputed to the second mortgagee or purchaser of the first estate. The case is yet stronger if at the time of the assigment the assignee had notice of the *puisne* mortgage (*z*). These cases in effect overrule the decision in *Tassel* v. *Smith* (*a*), and to a certain extent that in *Beevor* v. *Luck* (*b*), cases which for a long time bore very hardly upon purchasers and mortgagees of equities of redemption; and apart from the statutory displacement of the doctrine presently to be noticed, the tendency of recent judicial decisions has been against an extension of the doctrine of consolidation.

Consolidation in bankruptcy.

3. A mortgagee may on the bankruptcy of the mortgagor, if his trustee does not at once redeem, take a transfer of a mortgage on another of his estates and consolidate it with a debt due on his own mortgage, and may thus hold the two estates as a security for both debts (*c*). He could not, however, take an original mortgage after notice of insolvency, as that would amount to a fraudulent preference (*d*).

Cases in which consolidation may not take place.

4. There can be no consolidation where the transactions in question are not between the same parties or persons claiming through them (*e*); so there can be no consolidation where one mortgage is by a firm, and the other by one of the partners thereof (*f*). This case also decides that there can be no consolidation where there has been no default in respect of one of the mortgages, for until default the estate is not at law forfeited. A bill of sale holder is not entitled to consolidate his security with a

(*y*) *White* v. *Hillacre*, 3 Y. & C. Exch. 597; *Jennings* v. *Jordan*, 6 App. C. 698; 13 Ch. D. 639; 51 L. J. Ch. 129.

(*z*) *Baker* v. *Gray*, 1 Ch. D. 491.

(*a*) 2 De G. & J. 713.

(*b*) *Sup.*

(*c*) *Selby* v. *Pomfret*, 1 J. & H. 336; 3 De G. F. & J. 595.

(*d*) *Exp. Hotchkin*, 20 Eq. 746.

(*e*) *Jones* v. *Smith*, 2 Ves. jr. 376; *Higgins* v. *Frankis*, 15 L. J. Ch. 329; 10 Jur. 328.

(*f*) *Cummins* v. *Fletcher*, 14 Ch. D. 699.

mortgage of land, so as to exclude an execution creditor (*g*). Nor will the principle be applied to the prejudice of persons claiming one of the properties under a voluntary settlement (*h*).

44 & 45 Vict. c. 41, s. 17.

5. The Conveyancing and Law of Property Act, 1881, in effect abrogates the principle of Consolidation as far as concerns mortgages executed after Dec. 31st, 1881. It enacts that a mortgagor seeking to redeem any one mortgage shall be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem, *provided that no contrary intention is expressed in the mortgage deeds or one of them.* But the Act only applies where the mortgages are or one of them is made after the above-mentioned date (*i*), and it has no application where two properties are included in one mortgage and for one advance (*k*). It has been held under this section that in the case of a redemption action comprising two properties, there can be no consolidation of costs; they must be rateably apportioned between the properties (*l*).

(*g*) *Chesworth* v. *Hunt*, 5 C. P. D. 266.
(*h*) *Re Walhampton Estate*, 26 Ch. D. 391; 53 L. J. Ch. 1000.
(*i*) 44 & 45 Vict. c. 41, s. 17.
(*k*) *Hall* v. *Heward*, 32 Ch. D. 430; 55 L. J. Ch. 604.
(*l*) *De Caux* v. *Skipper*, 31 Ch. D. 635; overruling *Clapham* v. *Andrews*, 27 *ib.* 679; 53 L. J. Ch. 792.

Section III.—Equitable Mortgages.

I. *By Agreement.*
II. *By Deposit of Title Deeds.*
III. *Remedies.*

There are two species of equitable mortgages, which, though in many respects similar, are sufficiently distinct to require separate consideration. Classification.

The first class comprises those transactions viewed and treated in equity as mortgages, in which a person by agreement or mandate creates a charge upon his property.

The second and more peculiar class comprises equitable mortgages arising from the deposit of title deeds.

I. *Equitable Mortgages by Agreement or Mandate.*

1. Any agreement in writing, however informal, by which any property, real or personal, is to be a security for a sum of money, is a charge, and amounts to an equitable mortgage. Thus an agreement that a creditor shall hold land at a fair rent to be retained in satisfaction of the debt, is in the nature of a mortgage, and will be supported as such (*a*). Informal agreements for mortgages.

On the principle that *what is agreed to be done is considered in equity as done*, an express written agreement to effect a mortgage is treated as a mortgage (*b*). So a

(*a*) *Morony* v. *O'Dea*, 1 Ba. & Be. 109; Coote, 305.

(*b*) *Hankey* v. *Vernon*, 2 Cox, 12, 14; *Walsh* v. *Lonsdale*, 21 Ch. D. 9; 52 L. J. Ch. 2.

written instrument promising to pay a sum of money with interest "out of the estate of the deceased W. H.," and signed by all the persons interested in his estate, has been held (the personalty being exhausted) to amount to an equitable mortgage of the real estate (*c*). And an agreement by a married woman to charge her expectancy under the will, or as one of the next of kin of a living person, was on similar grounds enforced after that person's death (*d*). A covenant also that, if payment of a certain debt be not made, the creditor may by entry, foreclosure, sale, or mortgage, levy the amount from the lands of the debtor, is an equitable mortgage (*e*).

Mortgages of an equity of redemption.

2. Another species of equitable mortgage is seen in mortgages of the equity of redemption of an estate which has been already legally mortgaged. But it is not necessary to enter into a separate discussion of such equitable mortgages, inasmuch as any particulars in which they differ from legal mortgages are fully explained under the heads of Notice and Tacking (*f*).

II. *Equitable Mortgages by Deposit of Title Deeds.*

Statute of Frauds.

It is a well-known provision of the Statute of Frauds (*g*) that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or his duly authorised agent (*h*).

(*c*) *Suart* v. *Toulmine*, 2 Pow. Mtg. 1049 a, ed. 6.

(*d*) *Flower* v. *Buller*, 15 Ch. D. 665.

(*e*) *Eyre* v. *McDowell*, 9 H. L. 620.

(*f*) See pp. 336 *et seq.*, 296 *et seq.*

(*g*) 29 Car. II. c. 3.

(*h*) Sect. 4.

In the case of *Russel* v. *Russel* (*i*) this was relied on as an answer to an action which sought to establish a charge on the mere fact of the deposit of a deed. But the objection did not avail; and it has long been established that if the title deeds of an estate are, without even verbal communication, deposited by a debtor in the hands of his creditor, the mere fact of such deposit, if otherwise unaccounted for, is held to be *primâ facie* evidence of an agreement for a mortgage of the estate; and the creditor may avail himself of it as of an agreement in writing for that purpose, and may bring an action for the completion of his security by a legal conveyance (*k*). These bold decisions have given rise to transactions which now form a conspicuous feature in equitable jurisprudence, and which require attentive consideration.

Russel v. *Russel.*

Deposit sufficient evidence of an agreement.

(1.) **What constitutes a mortgage by deposit.**

(i.) It has already been stated that a deposit of title deeds, unaccompanied by any verbal agreement, is evidence of an agreement for a mortgage which may be enforced; and this proposition may be abundantly illustrated. Thus a deposit of a copy of Court rolls (*l*), of an agreement for a lease (*m*), of a policy of insurance (*n*), of a registered mortgage of a ship (*o*), or of a certificate of shares in a public company (*p*), may constitute an equitable mortgage.

What deposits sufficient.

(ii.) An equitable mortgage may be created by a deposit of part of the title deeds only, and it is not necessary that the deeds deposited should show a good title in the depositor (*q*). But a deposit of deeds relating to part of an

Deposit of part of deeds.

(*i*) 1 Bro. C. C. 269; 1 W. & T. L. C. 726.

(*k*) *Exp. Wright*, 19 Ves. 258; *Re McMahon*, 55 L. T. R. 763.

(*l*) *Exp. Warner*, 1 Rose, 286.

(*m*) *Unity, &c. Co.* v. *King*, 25 Beav. 72.

(*n*) *Ferris* v. *Mullins*, 2 Sm. & G. 378.

(*o*) *Lacon* v. *Liffen*, 4 Giff. 75.

(*p*) *Exp. Moss*, 3 De G. & Sm. 599; *France* v. *Clark*, 26 Ch. D. 257; 53 L. J. Ch. 588.

(*q*) *Exp. Wetherall*, 11 Ves. 398; *Roberts* v. *Croft*, 24 Beav. 223; 2 De G. & J. 1.

estate, with a representation that they relate to the whole, will only effect a mortgage of the part actually comprised in the deeds (*r*). If the deeds are deposited, some with one creditor, some with another, each may have a valid charge (*s*). Moreover, if there are no title deeds or conveyances in the depositor's possession, an equitable mortgage may be created by the deposit of the receipt for purchase-money, containing the terms of the agreement for sale (*t*).

Of receipt for purchase-money.

Registered lands.

(iii.) Where land had to be registered under the Land Registry Act (*u*), an equitable mortgage might be created by a deposit of the land certificate (*x*), but not by that of the title deeds (*y*). The same provision is continued under the Land Transfer Acts (*z*).

Deposit with third person.

(iv.) A deposit of the deeds with a third person for the benefit of the creditor will be sufficient to create a security; and the possession of the agent of the debtor may suffice, if there is a memorandum of deposit showing an intention to make him a trustee (*a*). But a deposit with the wife of the debtor, to be kept by her for the creditor, was held insufficient (*b*); and where the deeds remain in the hands of the debtor, accompanied by a memorandum of deposit, there is no valid mortgage (*c*) unless indeed the debtor in fact holds them as the servant of the creditor (*d*). A deposit made by an agent of the debtor with due authority constitutes a mortgage and creates a valid charge, even though the agent borrows more than he was authorised to do and fraudulently appropriates the excess (*e*).

(*r*) *Jones* v. *Williams*, 24 Beav. 47.
(*s*) *Roberts* v. *Croft*, 24 Beav. 223; 2 De G. & J. 1.
(*t*) *Goodwin* v. *Waghorn*, 4 L. J. (N. S.) Ch. 172.
(*u*) 25 & 26 Vict. c. 53.
(*x*) Sect. 73.
(*y*) Sect. 63.
(*z*) 38 & 39 Vict. c. 87, s. 81; 60 & 61 Vict. c. 65, s. 8.
(*a*) *Lloyd* v. *Attwood*, 3 De G. & J. 614, 619.
(*b*) *Exp. Coming*, 9 Ves. 115.
(*c*) *Adams* v. *Claxton*, 6 Ves. 226, 230.
(*d*) *Ferris* v. *Mullins*, 2 Sm. & G. 378.
(*e*) *Brocklesby* v. *Temperance P. B. Soc.*, (1893) 3 Ch. 130; (1895) A. C. 173; 64 L. J. Ch. 433; and see also *Lloyd's Bank* v. *Bullock*, (1896) 2 Ch. 192; 65 L. J. Ch. 680.

(v.) But though a deposit of title deeds or their equivalent is evidence of an agreement for a mortgage which may suffice to establish a claim for relief in equity, it does not itself constitute an agreement. The depositor may show that the deposit was not made with the view and intent to effect a security, but with some other intent or for some other purpose. The mere possession of the title deeds is, therefore, not enough to create an equitable security (*f*). For instance, deeds may be deposited merely for the purpose of safe custody; or on some definite condition (*g*); or there may be attendant circumstances showing that there was no intention to create a mortgage, as, for instance, where deeds have been left with a banker after he has refused to advance money on them (*h*); or the deposit may be accompanied by a memorandum showing that there was not an intention to create a security (*i*). In none of these cases will an equitable mortgage be created; but where the possession of the deeds cannot be accounted for save on the supposition that a mortgage was intended, it amounts to a presumption of such intention so strong that it may be acted upon (*k*).

Depositor may show that there was no agreement, and that the purpose was not to effect a security.

(vi.) Where deeds are deposited for the purpose of preparing a legal mortgage, a presumption arises of an intention to create an equitable mortgage. At one time it was sought to distinguish between the case where the intention was to secure an antecedent debt, and where it was with a view to secure only a future advance, it having been held that in the latter case no equitable mortgage arose from the deposit (*l*). But it seems that this distinction cannot be sustained, and that now in all cases an equitable mortgage will result from the deposit (*m*). This will clearly

Deposit for purpose of creating a legal mortgage.

(*f*) *Chapman* v. *C.*, 13 Beav. 308.
(*g*) *Burton* v. *Gray*, 8 Ch. 932.
(*h*) *Lucas* v. *Dorrien*, 7 Taunt. 278.
(*i*) *Shaw* v. *Foster*, L. R. 5 H. L. 340; *Spoile* v. *Whayman*, 20 Beav. 607.
(*k*) *Harford* v. *Carpenter*, 1 Bro. C. C. 270, n.; *Dixon* v. *Muckleston*, 8 Ch. 155.
(*l*) *Norris* v. *Wilkinson*, 12 Ves. 192.
(*m*) *Edge* v. *Worthington*, 1 Cox, 211; *Exp. Bruce*, 1 Rose, 374.

be the case if an agreement to give a mortgage accompanies the deposit (*n*).

Written memorandum sufficient without deposit.

(vii.) A valid equitable mortgage may, as we have seen, be created by a written agreement apart from any deposit; and a written memorandum of deposit is a sufficient agreement (*o*), especially if the deeds be already in the possession of a third party (*p*). But in no case can a mere oral agreement without an actual deposit create an equitable security (*q*). The question to consider in the case of an oral agreement is whether or not the deposit can be regarded as a part performance thereof, so as to take it out of the Statute of Frauds (*r*).

(2.) **The effects of an equitable mortgage by deposit.**

i. *As to the property affected.*

What property is deemed to be mortgaged.

Primâ facie, the deposit of deeds by a debtor constitutes a mortgage of all the property comprised in them (*s*). But the security may be limited by a written memorandum to that effect (*t*). If, on the contrary, the memorandum refers to deeds which are not deposited, it does not effect a mortgage of the property comprised in them (*u*). Thus the memorandum may limit but may not extend the effect of the deposit, unless, of course, the memorandum is in such a form as in itself to constitute an equitable mortgage.

Memorandum may limit the effect of the deposit.

After-acquired property. Fixtures,

A deposit of title deeds will comprehend any interest which the depositor may afterwards acquire in the property (*x*), and will include not only fixtures existing at the time, but also those subsequently erected thereon, whether the fixtures are mentioned or not (*y*). And the result is

(*n*) *Hockley* v. *Bantock*, 1 Russ. 141; *Keys* v. *Williams*, 3 Y. & C. Ex. 55.
(*o*) *Exp. Orrett*, 3 Mont. & A. 153.
(*p*) *Daw* v. *Terrel*, 33 Beav. 218.
(*q*) *Exp. Coombe*, 4 Madd. 349.
(*r*) *Re Beetham*, 18 Q. B. D. 380, 766; 56 L. J. Q. B. 635.
(*s*) *Ashton* v. *Dalton*, 2 Coll. 566.
(*t*) *Exp. Glyn*, 1 M. D. & De G. 29.
(*u*) *Exp. Powell*, 6 Jur. 490.
(*x*) *Pryce* v. *Bury*, 16 Eq. 153.
(*y*) *Exp. Price*, 2 M. D. & De G. 518; *Exp. Astbury*, 4 Ch. 630.

the same whether the deposit is made by the owner in fee who is also owner of the fixtures, or by a lessee who is owner of the fixtures, although as between landlord and tenant they are removable (*z*). On the bankruptcy of the depositor of a lease, the fixtures will not be considered as being in his order and disposition, but will belong to the mortgagee (*a*).

in bankruptcy.

A deposit of title deeds can only affect the interest of the depositor. Thus, if the deposit be by a trustee, and there is no consent or acquiescence of the *cestui que trust*, the security extends only to any beneficial interest which the trustee may have (*b*); and a deposit by a tenant for life cannot affect the interest of remainder-men (*c*).

Interest of depositor only affected.

ii. *What debts it may secure.*

It is a matter of evidence what debts are to be deemed to be comprised in the security of an equitable mortgage. *Primâ facie* only the sum advanced at the time of the deposit is considered to be secured thereby (*d*); but the circumstances of the case may suffice to show an intention to secure antecedent advances, and if so it will be carried into effect (*e*); and either written or parol evidence of intention may suffice to extend the security to subsequent advances (*f*); and generally a verbal agreement to make a subsequent advance, on a deposit of deeds already made for another purpose, is sufficient to constitute an equitable mortgage as to the subsequent advance (*g*).

Primâ facie only debts advanced at time of deposit secured. Circumstances or evidence may extend this.

A debt secured by an equitable mortgage, although originating in a simple contract, bears interest at the rate

Interest.

(*z*) *Exp. Loyd*, 3 D. & C. 765; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123; *Meux* v. *Jacobs*, L. R. 7 H. L. 481.

(*a*) *Exp. Barclay*, 5 De G. M. & G. 403.

(*b*) *Manningford* v. *Toleman*, 1 Coll. 670; *Exp. Smith*, 2 M. D. & De G. 587.

(*c*) *Turner* v. *Letts*, 20 Beav. 185.

(*d*) *Exp. Martin*, 4 D. & C. 457; 2 M. & A. 243.

(*e*) *Exp. Farley*, 1 M. D. & De G. 683, 689.

(*f*) *Exp. Langston*, 17 Ves. 230; *Shepherd* v. *Titley*, 2 Atk. 348.

(*g*) *Exp. Kensington*, 2 V. & B. 79; *Exp. Whitbread*, 19 Ves. 209.

of 4 per cent. from the date of the deposit, even without an express agreement to that effect (*h*).

iii. *Against whom the security prevails.*

Security valid against the Crown.

A deposit of title deeds creates a security valid as against the Crown, if made before the depositor became a Crown debtor by record or specialty (*i*).

Trustee in bankruptcy.

The security is also good against the debtor's trustee in bankruptcy, unless being made so near the bankruptcy as to amount to a fraudulent preference (*k*).

Judgment creditor.

It also prevails against the interest of a subsequent judgment creditor, although he may have acquired legal seisin under an *elegit* and without notice (*l*).

Subject to prior equities.

But an equitable mortgagee is liable to all prior equities affecting the depositor; for instance, as we have seen, a deposit of title deeds given in breach of trust, though without notice, does not affect the claim of the beneficiaries; and where a mortgage was obtained without consideration, and then transferred with notice to a person who deposited it to secure a debt, it was held that the depositee could not be in a better situation than the depositor, and his security was therefore useless (*m*).

Negligence of depositee.

If an equitable mortgagee by deposit carelessly parts with the deeds so as to enable a second mortgage to be made by deposit thereof, he will be postponed to the second mortgagee, since it was through his laches that the fraud was rendered possible (*n*). And as between equitable mortgagees, the second may acquire priority without proving negligence amounting to fraud. Omission to make proper enquiry for, or to obtain possession of, the title deeds may suffice (*o*). But a parting with the deeds in the ordinary course of business, as, for instance, to a solicitor or con-

(*h*) *Re Kerr's Policy*, 8 Eq. 331.
(*i*) *Casberd* v. *Ward*, 6 Pri. 411.
(*k*) *Exp. Ainsworth*, 3 M. & A. 457.
(*l*) *Whitworth* v. *Gaugain*, 3 Ha. 416; 1 Ph. 728.
(*m*) *Parker* v. *Clarke*, 30 Beav. 54.
(*n*) *Waldron* v. *Sloper*, 1 Drew. 193; *Keate* v. *Phillips*, 18 Ch. D. 560; 50 L. J. Ch. 664.
(*o*) *Farrand* v. *Yorkshire Bank*, 40 Ch. D. 182; 58 L. J. Ch. 238.

fidential clerk, who makes a fraudulent use of them, will not have the effect of postponing the security (*p*).

iv. *Generally.*

Benefit may be subsequently extended.

The benefit of an equitable mortgage by deposit may be subsequently extended to persons who were not originally depositees. If a deposit of deeds is made to a firm, the general supposition is that it is not intended to enure for the benefit of future members of that firm; but if an intention that it should so operate is expressed on the memorandum of deposit, or is proved by parol evidence, or is evidenced by continued dealings with the new firm, the new firm may gain the benefit of the security (*q*). The special features of the liens of bankers, &c., are stated elsewhere (*r*).

The rules as to priority, as between equitable mortgagees and others, are fully discussed under the headings of notice, and tacking of mortgages (*s*).

Equitable mortgagee of lease not liable to covenants.

It was formerly supposed that a *cestui que trust* or depository of a lease was liable for the rent and covenants in a suit by the lessor; but the contrary is now clearly established; and the landlord cannot compel him to take, or the mortgagor to execute, an assignment so as to bring him within the liability of the covenants, even if he has been in possession and paid rent (*t*).

III. *Remedies of an Equitable Mortgagee.*

Foreclosure the proper remedy.

(1.) It has been much discussed whether the proper remedy of an equitable mortgagee is foreclosure (after the

(*p*) *Re Vernon, Ewens & Co.*, 33 Ch. D. 402; *Carritt* v. *R. & P. Adv. Co.*, 42 Ch. D. 263; 58 L. J. Ch. 688; distinguished in *Rimmer* v. *Webster*, (1902) 2 Ch. 163.

(*q*) *Exp. Kensington*, 2 V. & B. 79, 83; *Exp. Oakes*, 2 M. D. & De G. 234.

(*r*) Page 320.

(*s*) See pp. 336 *et seq.*, 296 *et seq.*

(*t*) *Moores* v. *Choat*, 8 Sim. 508; *Moore* v. *Greg*, 2 De G. & Sm. 304; 2 Ph. 717.

analogy of a legal mortgage) or sale (after the analogy of a charge). Prior to the Conveyancing Act, 1881, however, it was settled that in the case of a mortgage of lands the proper remedy was foreclosure (*u*), whether the mortgage arose from an agreement for a legal mortgage (*x*), or from a deposit of title deeds with or without a written memorandum (*y*), or was a mortgage of an equity of redemption (*z*); but if there was a deposit of title deeds, accompanied by a written agreement for a mortgage, the mortgagee was entitled to either sale or foreclosure (*a*).

By s. 2, sub-s. 6 of that Act (*b*), a mortgage is so defined as to include "any charge on any property securing money or money's worth," terms which clearly comprise an equitable mortgage, and accordingly, by s. 25 of the same Act, the Court is empowered to order a sale instead of foreclosure at the request of the mortgagee, even in the absence of an agreement for a legal mortgage (*c*). An equitable mortgagee selling under the Act cannot by virtue of s. 21 thereof convey the *legal* estate vested in the mortgagor (*d*), but a power of sale can be conferred by means of an irrevocable power of attorney under s. 8 of the Conveyancing Act, 1882 (*e*).

The remedy is sale in case of a charge or pledge of chattels.

Where there is a mere charge or lien, the remedy is sale, and not foreclosure (*f*); sale is also the proper remedy in the case of a pledge of personal chattels (*g*). On a mortgage of shares by deposit of the certificate, however, the proper remedy is an order for transfer and foreclosure (*h*).

(*u*) *Pryce* v. *Bury*, 2 Drew. 41; 18 Jur. 967; *James* v. *J.*, 16 Eq. 153. For form of judgment, see *Lees* v. *Fisher*, 22 Ch. D. 283.

(*x*) *Frail* v. *Ellis*, 16 Beav. 350.

(*y*) *Carter* v. *Wake*, 4 Ch. D. 605, 606, per Jessel, M. R.; *Backhouse* v. *Charlton*, 8 Ch. D. 444.

(*z*) *Richards* v. *Cooper*, 5 Beav. 304.

(*a*) *York, &c. Co.* v. *Artley*, 11 Ch. D. 205; *Wade* v. *Wilson*, 22 Ch. D. 235; 52 L. J. Ch. 399.

(*b*) 44 & 45 Vict. c. 41.

(*c*) *Oldham* v. *Stringer*, 33 W. R. 251; *Grissell* v. *Money*, 38 L. J. Ch. 312.

(*d*) *Re Hodson & Howe's Contract*, 35 Ch. D. 668; 55 L. J. Ch. 755. See *Solomon & Meagher's Contract*, 40 Ch. D. 508; 58 L. J. Ch. 339.

(*e*) 45 & 46 Vict. c. 39.

(*f*) *Tennant* v. *Trenchard*, 4 Ch. 537; *Re Owen*, (1894) 3 Ch. 220; 63 L. J. Ch. 749.

(*g*) *Carter* v. *Wake*, *sup.*

(*h*) *Harrold* v. *Plenty*, (1901) 2 Ch. 314; 70 L. J. Ch. 562.

An equitable mortgagee is entitled to a receiver, and one may be appointed on motion before defence, and even before appearance in cases where a risk of loss is shown (*i*). But he is not, like a legal mortgagee, entitled to six months' notice or to six months' interest in lieu of notice before being bound to accept tender of the mortgage debt (*j*). Receiver.

(2.) The remedies of mortgagees (including equitable mortgagees) in bankruptcy, and also in the administration of insolvent estates, and in the winding-up of companies, are now regulated by s. 6 of the Bankruptcy Act, 1883 (*k*). The general principle is that the mortgagee may either give up his security and prove for his whole debt or retain his security and prove for whatever deficiency there may be. Under Bankruptcy Act.

(*i*) *Aberdeen* v. *Chitty*, 3 Y. & C. Ex. 379; *Meaden* v. *Sealey*, 6 Ha. 620.

(*j*) *Fitzgerald's Trustee* v. *Mellersh*, (1892) 1 Ch. 385; 61 L. J. Ch. 231.

(*k*) 46 & 47 Vict. c. 52; Jud. Act, 1875 (38 & 39 Vict. c. 77), s. 10.

Section IV.—Liens.

Generally.

I. *Liens at Law.*
II. *Equitable Liens.*
1. *Charges.*
2. *Vendor's Lien.*
3. *Vendee's Lien.*

Definition.

Analogous in many respects to mortgages are those charges of various kinds which are designated by the general term "liens." A lien is not, however, like a mortgage, a *jus in re*, or a *jus ad rem*, but is simply *a right to possess and retain the property subject thereto, until some charge attaching to it is paid or discharged* (*a*).

Liens legal or equitable.

Liens are either legal or equitable; that is to say, some liens have always been recognised by the common law; others, apart from recent legislation, could be enforced only in Courts of Equity.

Specific liens.

I. Of liens recognised at law some are specific, others general. It will not be necessary here to do more than briefly indicate some examples of such liens. Familiar

Artisan.

illustrations of specific liens are, the right which an artisan has to retain an article delivered to him to work on until he is paid for the labour expended thereon (*b*); the lien of

Accountant.

an accountant upon books entrusted to him for examination

(*a*) Story, 506.
(*b*) *Scarfe* v. *Morgan*, 4 M. & W. 270; *Bellamy* v. *Davey*, (1891) 3 Ch. 540; 60 L. J. Ch. 778.

and arrangement (*c*); the lien of a shipowner who has paid a sum for salvage, upon the goods on board for the amount of contribution to which the owner of the goods is liable (*d*), and the lien of a partner on the partnership property for what may be found due to him on taking the partnership account (*e*). Shipowner. Partner.

A general lien differs from one that is specific in that it entitles the creditor to retain the property in question as a security, not merely for a particular charge, but for the general balance due to him. It has been held that a general lien can only be maintained in particular trades where its existence has been judicially declared (*f*). Lord Mansfield stated that a general lien would be upheld in four cases: (1) where it is an express contract; (2) where it is implied from the usage of trade; (3) where it is implied from the manner of dealing between the parties on the particular case; (4) where the party has acted as a factor (*g*). General liens, when maintainable.

An important instance of a lien by usage is the lien of a banker over all the bills, papers, and securities of a customer in his hands, which right subsists unless there be an express contract or circumstances showing an implied contract inconsistent with the lien (*h*). An instance of a circumstance showing such an implied contract is the case of a lease being accidentally left with the banker after he had refused to lend money upon it (*i*). Liens by usage: Bankers.

A broker has a similar lien (*k*), and an innkeeper has a general lien on articles belonging to his guests which come into his possession as innkeeper (*l*). Brokers. Innkeepers.

A factor has a general lien on goods consigned to him Factors.

(*c*) *Exp. Southall*, 17 L. J. Bk. 21.

(*d*) *Briggs* v. *Merchant, &c. Assoc.*, 18 L. J. Q. B. 178; *Re Ripon City*, (1897) P. 226; 66 L. J. P. 110.

(*e*) *Skip* v. *Harwood*, 2 Swanst. 586.

(*f*) *Bock* v. *Gopisson*, 6 Jur. N. S. 547; 7 *ib.* 81.

(*g*) *Green* v. *Farmer*, 4 Burr. 2221.

(*h*) *Davies* v. *Bowsher*, 5 T. R. 488; *London Chartered Bank* v. *White*, 4 App. Cas. 413; *Re European Bank*, 8 Ch. 41.

(*i*) *Lucas* v. *Dorrien*, 7 Taunt. 278.

(*k*) *Hewison* v. *Guthrie*, 2 Bing. N. C. 755.

(*l*) *Threfall* v. *Borwick*, 7 L. R. Q. B. 711; 10 *ib.* 210; *Robins* v. *Gray*, (1895) 2 Q. B. 501; 65 L. J. Q. B. 44.

for sale, and on the purchase-money thereof (*m*), as well as a specific lien on goods bought for the purchase-money and freight paid in respect thereof (*n*). A wharfinger has also the same general lien as a factor for the balance of his wharfage dues and freight (*o*). As to the liens of auctioneers, warehousemen, packers, and others, see the cases cited below (*p*).

Wharfingers.

Solicitors' general lien.

The lien of a solicitor is of such a nature as to require especial consideration. A solicitor has a general lien on the papers of his client in his hands for his taxable costs, charges, and expenses (*q*); every client is, therefore, entitled to have his costs taxed, though there may be no item in the account relating to an action at law or in equity (*r*). This lien is merely a right to retain, and cannot be actively enforced (*s*). In case of a change of solicitors pending an action, the Court may order the delivery up to the new solicitor of the documents required for the purposes of the action, pending taxation of the ex-solicitor's costs, and without prejudice to his lien (*t*). The lien must not be asserted so as to embarrass the proceedings (*u*). The lien appears not to be waived by an order for payment, or by an attachment for non-payment of costs, nor by any proceeding against the person of the debtor (*x*). It is not confined to deeds and papers, but extends to other articles delivered to the solicitor for the purposes of the action; for instance, to books, shares in a company, &c. (*y*). But it only applies to such deeds and

What it includes.

(*m*) *Godin* v. *London Ass. Co.*, 1 Bur. 490; *Robson* v. *Kemp*, 4 Esp. 236.

(*n*) *Exp. Emery*, 2 Ves. sr. 674; *Exp. Good*, 3 M. & A. 246.

(*o*) *Naylor* v. *Mangles*, 1 Esp. 109; 25 & 26 Vict. c. 63, s. 76.

(*p*) *Webb* v. *Smith*, 30 Ch. D. 192; 55 L. J. Ch. 343; *Exp. Deeze*, 1 Atk. 228; *Re Witt*, 2 Ch. D. 489.

(*q*) *Stevenson* v. *Blakelock*, 1 M. & S. 535.

(*r*) *Re Barker*, 6 Sim. 476.

(*s*) *Bozon* v. *Bollond*, 4 My. & Cr. 357.

(*t*) *Hutchinson* v. *Norwood*, 34 W. R. 637; *Bluck* v. *Lovering*, 35 *ib.* 232; *Boden* v. *Hensby*, (1892) 1 Ch. 101; 61 L. J. Ch. 174.

(*u*) *Boughton* v. *B.*, 23 Ch. D. 169; *Ackermann* v. *Lockhart*, (1898) 2 Ch. 1; 67 L. J. Ch. 284.

(*x*) *Lloyd* v. *Mason*, 4 Ha. 132; *Exp. Bryant*, 1 Mad. 49.

(*y*) *Friswell* v. *King*, 15 Sim. 191; *General Share Trust Co.* v. *Chapman*, 1 C. P. D. 771.

documents as come to his hands in his character as solicitor of the person against whom the lien is claimed (*z*), and it extends only to secure law charges, not including a debt due on another account (*a*) or advances of money (*b*). The lien is available notwithstanding that the claim is statute-barred (*c*).

Specific lien on funds recovered.

A solicitor has also, apart from the statute presently to be mentioned, a specific lien on the fund recovered by him in an action for the costs of the action (*d*), and similarly, also, upon money of the client in his hands to abide the result of the action (*e*). But the remedy of a solicitor in such a case has been increased by, and is now dependent on, the statute 23 & 24 Vict. c. 127.

Lien against real estate, 23 & 24 Vict. c. 127.

Previous to 23 & 24 Vict. c. 127, a solicitor had no lien for his costs against *real estate* either at law or in equity. By s. 28 of that Act it is enacted that it shall be lawful for the Court or judge, before whom any suit or matter has been heard, to declare that the solicitor employed therein is entitled to a charge upon the property recovered or preserved by his instrumentality in such suit or matter; and that all conveyances and acts done to defeat such charge shall, unless made to a *bonâ fide* purchaser without notice, be absolutely void and of no effect as against such charge or right (*f*). This Act applies to property of all kinds (*g*), and a liberal construction is placed upon the words "recovered or preserved." Thus, the appointment of a receiver of the real estate of an infant has been held to bring the property within the section (*h*). And where the action is for the benefit of all parties, the lien attaches, irrespective

(*z*) *Exp. Fuller*, 16 Ch. D. 617.
(*a*) *Re Galland*, 31 Ch. D. 296.
(*b*) *Re Taylor, Stileman & Co.*, (1891) 1 Ch. 590; 60 L. J. Ch. 525; *Groom* v. *Cheesewright*, (1895) 1 Ch. 730; 64 L. J. Ch. 406.
(*c*) *Carter* v. *C.*, 34 W. R. 57.
(*d*) *Bozon* v. *Bollond*, *sup.*
(*e*) *Hanson* v. *Reece*, 3 Jur. N. S. 1204.
(*f*) See *Cole* v. *Eley*, (1894) 2 Q. B. 180, 350; 63 L. J. Q. B. 682.
(*g*) *Birchall* v. *Pugin*, L. R. 10 C. P. 399; *Re Graydon*, (1896) 1 Q. B. 47; 65 L. J. Q. B. 328; *Exp. Tweed*, (1899) 2 Q. B. 167; 68 L. J. Q. B. 794; but see also *Re Llewellin*, (1891) 3 Ch. 145; 60 L. J. Ch. 732; and *Bowker* v. *Austin*, (1894) 1 Ch. 556; 63 L. J. Ch. 205.
(*h*) *Baile* v. *B.*, 13 Eq. 497.

of the interest of the client (*i*). Money paid into Court is not deemed to be "property recovered" (*k*), but money paid to compromise an action is so regarded (*l*), though the suit may be on behalf of infants (*m*). The charge is, in fact, in the nature of salvage, and may be made in the interests of persons who did not employ the solicitor and are not parties to the suit, if they adopt the benefit obtained in it (*n*). The Court having declared the lien, will give liberty to apply to have the costs raised by sale or otherwise (*o*).

The lien has priority over debentures, so long as they remain a floating security (*p*), notwithstanding a stipulation that the company shall not create any charges having priority; and also over a mortgage the title to which is maintained in the action (*q*). The assignee of a solicitor may assert the lien and have a charging order (*r*).

By Ord. LXV., r. 14, it is provided (contrary to previous decisions (*s*)) that a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought (*t*). But this power is in the discretion of the Court, and will not be exercised so as to operate unjustly towards the solicitor's rights (*u*). There is no right to set off costs incurred in different actions (*x*) or in proceedings in different Courts (*y*).

(*i*) *Bailey* v. *Birchall*, 2 H. & M. 371.

(*k*) *Westacott* v. *Bevan*, (1891) 1 Q. B. 774; 60 L. J. Q. B. 536; and see *Re Humphreys*, (1898) 1 Q. B. 520.

(*l*) *Ross* v. *Buxton*, 42 Ch. D. 190; 58 L. J. Ch. 442; *The Paris*, (1896) P. 77; 65 L. J. P. 42; *Margetson* v. *Jones*, (1897) 2 Ch. 314; 66 L. J. Ch. 619.

(*m*) *Wright* v. *Sanderson*, (1901) 1 Ch. 317; 70 L. J. Ch. 119.

(*n*) *Greer* v. *Young*, 24 Ch. D. 545; *Bulley* v. *B.*, 8 *ib.* 479.

(*o*) *Green* v. *G.*, 26 Ch. D. 16.

(*p*) *Brunton* v. *Electrical Corp.*, (1892) 1 Ch. 434; 61 L. J. Ch. 256.

(*q*) *Scholey* v. *Peck*, (1893) 1 Ch. 709; 62 L. J. Ch. 658.

(*r*) *Briscoe* v. *B.*, (1892) 3 Ch. 543; 61 L. J. Ch. 665.

(*s*) *Exp. Cleland*, 2 Ch. 803; *Hamer* v. *Giles*, 11 Ch. D. 942.

(*t*) *Goodfellow* v. *Gray*, (1899) 2 Q. B. 498; 68 L. J. Q. B. 1032.

(*u*) *Edwards* v. *Hope*, 14 Q. B. D. 922; 54 L. J. Q. B. 379.

(*x*) *Blakey* v. *Latham*, 41 Ch. D. 518.

(*y*) *Re Bassett*, (1896) 1 Q. B. 219; 65 L. J. Q. B. 144; *Hassell* v.

A solicitor who takes a security is considered to have abandoned his lien (*z*); but for this purpose a charging order under the Act is not deemed a security so as to interfere with the lien which he enjoys apart from the Act (*a*). Securities inconsistent with the lien.

In the case of a change of solicitors, the lien of the acting solicitor has priority over that of the discharged solicitor (*b*). Change of solicitors.

II. *Equitable Liens.*

1. The most conspicuous and important among equitable liens are those arising from charges of legacies and portions upon real estate. Such liens create a trust which equity will enforce against the person creating the lien, and persons claiming as volunteers or with notice under him. The effect of such charges is more fully considered elsewhere (*c*). Charges.

Other instances of liens which do not call for detailed description are the lien of trustees for money properly expended on the trust property (*d*); the lien of a *bonâ fide* possessor in wrongful possession for improvements made under the belief that he was absolute owner (*e*); and a lien by way of salvage, on a policy of assurance, for premiums paid to keep it on foot, as to which see cases cited below (*f*); from which it appears that a stranger cannot acquire the lien except by virtue of contract, or as trustee, or mortgagee, or by subrogation to the trusts of a trustee.

Stanley, (1896) 1 Ch. 607; 65 L. J. Ch. 494; *Russell* v. *R.*, (1898) A. C. 307; 67 L. J. P. 69.

(*z*) *Balsh* v. *Symes*, T. & R. 92; *Re Taylor, Stileman & Co.*, (1891) 1 Ch. 590; 60 L. J. Ch. 525; *Re Douglas*, (1898) 1 Ch. 199; 65 L. J. Ch. 85.

(*a*) *De Bay* v. *Griffin*, 10 Ch. 294, n.

(*b*) *Rhodes* v. *Sugden*, 34 Ch. D. 155; 56 L. J. Ch. 127; *Knight* v. *Gardner*, (1892) 2 Ch. 368; 61 L. J. Ch. 399.

(*c*) Pages 357 *et seq.*, 570.

(*d*) *Darke* v. *Williamson*, 25 Beav. 622.

(*e*) *Neesom* v. *Clarkson*, 4 Ha. 97.

(*f*) *Leslie* v. *French*, 23 Ch. D. 552; 52 L. J. Ch. 762; *Falcke* v. *Scottish Imp. Ins. Co.*, 34 Ch. D. 234; 56 L. J. Ch. 707; *Re Winchelsea's Policy Tr.*, 39 Ch. D. 168; 58 L. J. Ch. 20.

2. Vendor's lien for unpaid purchase-money.

Lien of vendor.

The lien of a vendor for unpaid purchase-money, and that of a vendee for prematurely paid purchase-money, are among the most important instances of equitable liens, and therefore require detailed investigation.

In discussing the application of the well-known equitable principle known as the vendor's lien, it is necessary to distinguish between its operation as between the vendor and purchaser, and as between the vendor and third persons claiming through or under the purchaser. As, however, persons claiming under the purchaser as volunteers are in the same position as himself, the most convenient distribution of the subject is to include volunteers in the first inquiry, and then to consider the extent of the vendor's lien as against those whose title is derived from the purchaser for valuable consideration.

(1.) *As against a purchaser, his heirs, and voluntary assignees.*

General principle.

Mackreth v. *Symmons.*

The general principle as to the lien of the vendor of an estate is fully expressed in the judgment of Lord Eldon in *Mackreth* v. *Symmons* (*g*), which is to the following effect: Where a vendor, in compliance with a contract for the sale of an estate, executes a conveyance thereof, but the purchase-money is wholly or partially unpaid, then, notwithstanding that on the face of the conveyance it is expressed to be paid, or that a receipt for it is indorsed thereon, the vendor has a lien on the estate for the money remaining due to him.

The same case further shows that the mere circumstance of taking an additional security is not inconsistent with the continuance of the lien. The circumstances which are considered to amount to a waiver or abandonment of the lien are hereafter separately discussed.

Applies to

The lien applies to copyholds and leaseholds as well as

(*g*) 15 Ves. 329; 1 W. & T. L. C. 324.

to freeholds (*h*), and attaches when possession of the estate has been delivered to the purchaser, though there has been no conveyance to him (*i*). It does not, however, apply to personal property other than chattels real. As soon as a purchaser has possession (actual or constructive) of such property the lien is gone (*k*). The question of stoppage *in transitu* depends on a different principle, not relevant to the present inquiry.

copyholds and leaseholds,

not to personal chattels,

Where the consideration for the sale of an estate is in the form of an annuity, the lien attaches to secure the annuity, at least if no other security for that purpose is taken. Where the annuity has been secured by a bond or covenant, the cases have been somewhat conflicting. In the principal case, Lord Eldon held that there was no lien for the annuities; but he did so rather in consideration of the special circumstances of the case than as a general principle of law. In *Tardiffe* v. *Scrughan* (*l*) the lien was allowed, and this case has never been overruled, though in somewhat similar circumstances some judges have been slow to follow it (*m*). See also in favour of the lien, Sugden, V. & P. 676, ed. 14.

when consideration is an annuity.

Lien doubtful where there is other security.

Tardiffe v. *Scrughan.*

If a vendor agrees to lend money to the purchaser for improving the estate, his lien extends to the advances so made, as well as to the purchase (*n*).

Lien extends to moneys advanced.

Special consideration is required of those cases in which a vendor asserts his lien with respect to a sale to a railway or other company.

As a general rule, the lien attaches to lands purchased by such companies, whether by agreement or in the exercise of compulsory powers (*o*); and it includes unpaid compensation as well as purchase-money, unless such com-

Lien as against railway and other companies generally.

(*h*) *Winter* v. *Anson*, 3 Russ. 492; *Matthew* v. *Bowler*, 6 Ha. 110.

(*i*) *Smith* v. *Hibbard*, 2 Dick. 730.

(*k*) 15 Ves. 344; *Exp. Gwynne*, 12 Ves. 383.

(*l*) 1 Bro. C. C. 423.

(*m*) *Clarke* v. *Boyle*, 3 Sim. 502; *Buckland* v. *Pocknell*, 13 Sim. 412.

(*n*) *Exp. Linden*, 1 M. D. & De G. 435.

(*o*) *Walker* v. *Ware, &c. Co.*, 1 Eq. 195.

pensation is the subject of a separate agreement. Although a railway may have been made over the land, the lien may be enforced by sale (*p*); but not by an injunction restraining the use of the railway (*q*). Where, however, the consideration for the purchase is a rent-charge on the lands, there is no lien for securing its payment (*r*), but the owner of the rent-charge is entitled to a receiver of the tolls and net earnings of the undertaking, and may distrain on the lands (*s*).

Where the consideration is a rent-charge.

Lien within the Mortmain Act,

and Statute of Frauds;

but not an interest in land within Wills Act.

A vendor's lien was so far regarded as an interest in land as to be within the Mortmain Act (*t*), and a bequest of money due thereupon was therefore void (*u*); and it seems that a mere parol assignment of it would be ineffectual, as within the Statute of Frauds, unless accompanied by a deposit of title deeds (*x*). The lien, however, is not such an interest in land as to come within s. 23 of the Wills Act (*y*). So, if, after devising an estate, the devisor contracts to sell it, the purchase-money will belong to the personal representatives, and not to the devisee (*z*).

Lien barred by Statute of Limitations.

A vendor's lien not being an express trust, the right to enforce it may be barred by the Statute of Limitations at the end of twelve years (*a*), unless the case is taken out of the operation of the statute by a sufficient acknowledgment (*b*).

Not within 17 & 18 Vict. c. 113,

A vendor's lien was held not to be a mortgage within Locke King's Act (*c*), so that the personal estate of a deceased purchaser was primarily liable for the payment

(*p*) *Cosens* v. *Bognor, &c. Co.*, 1 Ch. 594; *Munns* v. *I. of Wight R. Co.*, 5 Ch. 414.

(*q*) *Pell* v. *Northampton, &c. R. Co.*, 2 Ch. 100; but see *Allgood* v. *Merrybent, &c. R. Co.*, 55 L. J. Ch. 743.

(*r*) *E. of Jersey* v. *Briton, &c. Dock Co.*, 7 Eq. 409.

(*s*) *Eyton* v. *Denbigh, &c. Co.*, 6 Eq. 14.

(*t*) 9 Geo. II. c. 36; see now 51 & 52 Vict. c. 42.

(*u*) *Harrison* v. *H.*, 1 R. & M. 71.

(*x*) *Dryden* v. *Frost*, 3 My. & Cr. 670; *Meux* v. *Smith*, 11 Sim. 421.

(*y*) 1 Vict. c. 26.

(*z*) *Farrar* v. *E. of Winterton*, 5 Beav. 1; *Re Clowes*, (1893) 1 Ch. 214. But see *Drant* v. *Vause*, 1 Y. & C. Ch. 580.

(*a*) 3 & 4 Will. IV. c. 27; 37 & 38 Vict. c. 57.

(*b*) *Toft* v. *Stephenson*, 1 De G. M. & G. 28; 5 *ib.* 735.

(*c*) 17 & 18 Vict. c. 113. See *infra*, p. 577.

of the purchase-money (*d*); but by 30 & 31 Vict. c. 69, the word "mortgage" was declared to include any lien for unpaid purchase-money upon any lands purchased by a testator; and by 40 & 41 Vict. c. 34, the same construction was applied in case the purchaser died intestate.

but included in amending Acts.

(2.) *As against purchasers for value.*

The equitable lien for unpaid purchase-money binds the estate, as well in the hands of persons claiming for valuable consideration under the purchaser *with notice*, as in the hands of the purchaser himself, his heirs, and voluntary assignees (*e*); but the lien will not prevail against a *bonâ fide* purchaser who buys without notice that the purchase-money remains unpaid, and acquires the legal estate (*f*). If, however, the legal estate is outstanding, then, as the second purchaser has only an equitable interest subsequent in time to the equitable lien, the equitable lien will have precedence, conformably to the maxim "*Qui prior est tempore potior est jure*" (*g*). But this again is subject to modification, since priority in time will not avail unless the equities are equal. If, therefore, the vendor has been guilty of negligence, he may lose his lien. Thus, in *Rice* v. *Rice* (*h*), certain leaseholds were assigned to a purchaser by a deed which recited the payment of the whole of the purchase-money, and had the usual receipt indorsed on it; the title deeds were delivered up to the purchaser, but the whole of the purchase-money was, in fact, not paid. The purchaser forthwith deposited the assignment and title deeds to secure an advance. It was held that the equity arising from the deposit ought to prevail against the lien, on the ground that the vendor had, by his negligence, placed it in the power of the purchaser to deal with the estate as absolute owner at law and in equity. The prin-

Whom the lien binds.

Lien may be lost by negligence.

Rice v. *Rice*.

(*d*) *Hood* v. *H.*, 3 Jur. N. S. 684.
(*e*) *Walker* v. *Preswick*, 2 Ves. 622; *Winter* v. *Anson*, 3 Russ. 488; 1 S. & S. 434.
(*f*) *Cator* v. *E. of Pembroke*, 1 Bro. C. C. 302.
(*g*) *Frere* v. *Moore*, 8 Pri. 475.
(*h*) 2 Drew. 73.

C. A. 1881. Receipt clause.

ciple of this case is now embodied in s. 55 of the Conveyancing Act, 1881, which enacts that "a receipt for "consideration money or other consideration in the body "of a deed or indorsed thereon shall, in favour of a sub-"sequent purchaser (or mortgagee) not having notice that "the money or other consideration thereby acknowledged "to be received was not in fact paid or given, wholly or in "part, be sufficient evidence of the payment or giving of "the whole amount thereof."

The results are :—

i. That the lien prevails against a second purchaser with notice, even though he acquires the legal estate; and as against a purchaser without notice, if the legal estate is outstanding, and the vendor has not been guilty of negligence.

ii. That the lien does not prevail against a *bonâ fide* purchaser who acquires the legal estate without notice; nor against a purchaser of an equitable interest, where the first vendor has been guilty of negligence. Or perhaps it may be said still more generally that the lien will not prevail against a subsequent equitable mortgagee who strengthens his equity by acquiring possession of the title deeds (*i*).

What amounts to notice.

The force of the lien being thus in a great measure dependent upon the question of notice, we may here add some illustrations, especially touching this class of cases, of what does and does not constitute notice, though this subject is more fully considered elsewhere (*k*).

Omission to inquire for title deeds.

Where a subsequent purchaser or mortgagee omits to make inquiries for the title deeds of the property in question, or accepts an insufficient excuse for their absence, the Court will impute to him the knowledge which such inquiry would have imparted, and will enforce against him any prior claim, the existence of which such inquiry would

(*i*) *Clarke* v. *Palmer*, 21 Ch. D. 124; 51 L. J. Ch. 634.
(*k*) See p. 336 *et seq.*

have discovered (*l*), although he may acquire the legal estate (*m*). Not so, however, if he has made inquiry, and a reasonable excuse has been given for the non-appearance of the deeds (*n*).

Under the Middlesex Registry Act, and the former Yorkshire Registry Act, registration of a vendor's lien was not required, and gave no priority (*o*); but by the Yorkshire Registry Acts of 1884 and 1885 (*p*), no lien has any effect or priority, as to lands in Yorkshire, as against any purchase or mortgage deed duly registered, and, in the absence of actual fraud, which means fraud importing grave moral blame (*q*), priority of registration determines priority of title. These Acts only apply to liens arising on or after the 1st of January, 1885; and they do not apply to copyholds.

Recitals.

A recital showing that the title is deduced from the first vendor, but not showing that the purchase-money has not been paid, is not sufficient to affect a purchaser with notice (*r*).

Trustee in bankruptcy bound.

The trustee in bankruptcy of a purchaser will be affected by the lien of a vendor, though he may have had no notice, since he takes subject to all equities attaching to the bankrupt (*s*).

(3.) *What amounts to waiver or abandonment of the lien.*

Lien not waived by taking a security *ipso facto*.

We have seen that the mere fact of the vendor taking an additional security for his money is not *per se* a waiver of his lien. Lien depends on an implied contract, and the question is, whether from the circumstances of the case the Court will infer that the lien was intended to be reserved,

(*l*) *Nat. Prov. Bank*, v. *Jackson*, 33 Ch. D. 1.

(*m*) *Worthington* v. *Morgan*, 16 Sim. 547; *Peto* v. *Hammond*, 30 Beav. 495; *Oliver* v. *Hinton*, (1899) 2 Ch. 264; 68 L. J. Ch. 583.

(*n*) *Allen* v. *Knight*, 5 Ha. 272; *Hewitt* v. *Loosemore*, 9 Ha. 449.

(*o*) 7 Anne, c. 20; *Kettlewell* v. *Watson*, 21 Ch. D. 685; 26 *ib.* 501; 53 L. J. Ch. 717.

(*p*) 47 & 48 Vict. c. 54; 48 & 49 Vict. cc. 4, 26.

(*q*) *Battison* v. *Hobson*, (1896) 2 Ch. 403; 65 L. J. Ch. 695.

(*r*) *Cator* v. *E. of Pembroke*, 1 Bro. C. C. 302.

(*s*) *Exp. Hanson*, 12 Ves. 349.

or that the intention was to give credit exclusively to the person from whom the security was taken.

It is a question of intention.

The general rule is that although the mere taking of a bond, bill, promissory note, or covenant for the purchase-money will not destroy the lien, yet where it appears that the bond, note, or covenant was *substituted* for the consideration money, and was in fact the thing bargained for, the lien ceases to exist. In other words, if the consideration for which the estate is sold is the bond, note, or covenant, then on the giving of this security, the vendor gets all that he bargained for, the transaction is complete, and he cannot thereafter assert a lien. It is evident that as a rule the intention of the vendor is not by taking one security to lose another. It requires, therefore, clear evidence to show that a lien was not intended (*t*). An express agreement is, however, not required, and a few illustrations will serve to indicate what acts short of that will be considered sufficient for the purpose.

What amounts to sufficient indication of intention to waive the lien.

Where there was a stipulation that payment of the purchase-money should be deferred until a certain time after a re-sale of the property, the vendor was considered to have abandoned his lien (*u*). The lien has, however, been given effect where the purchase-money was payable by instalments (*x*).

Deferred payment.

Mortgage of other lands.

A mortgage of other lands for the whole or part of the purchase-money (*y*), or a mortgage of the purchased estate for part of the purchase-money, permitting the rest to remain on personal security, has been thought sufficient to discharge the lien—in the first instance wholly, in the second to the extent of the money remaining on the personal security (*z*). The former of these cases was, however, not considered conclusive by Lord Eldon in

(*t*) 15 Ves. 341; *Frail* v. *Ellis*, 16 Beav. 350; *Re Taylor, Stileman & Co.*, (1891) 1 Ch. 590; 60 L. J. Ch. 525.

(*u*) *Exp. Parkes*, 1 G. & J. 228.

(*x*) *Nives* v. *N.*, 15 Ch. D. 649.

(*y*) *Nairne* v. *Prowse*, 6 Ves. 752.

(*z*) *Bond* v. *Kent*, 2 Vern. 281; *Capper* v. *Spottiswoode*, Taml. 21.

Mackreth v. *Symmons* (*a*), and it would seemingly be necessary to look further at the whole circumstances of the case (*b*).

Suffering one trustee to retain purchase-money.

If a vendor, knowing the purchase-money to be trust money, suffers one of the trustees to retain part of it without the knowledge of the co-trustees or the *cestui que trust*, he has no lien for the part so retained (*c*). Where, again, the vendor, without receiving the purchase-money, executes a conveyance for the purpose of enabling the purchaser to execute a mortgage, he will lose his lien as against the mortgagee (*d*). These cases are, however, rather illustrative of the loss of the lien by negligence than of its intentional waiver.

Slight evidence sufficient where consideration is an annuity.

We have already seen that where the consideration for the purchase is an annuity, slighter evidence will suffice to show an intention to abandon the lien than in other cases; if it may not even be said that in these circumstances the presumption is against the lien.

Vendor may not enforce his lien and collateral securities together.

A vendor, herein differing from a mortgagee, cannot proceed to enforce his lien and his collateral securities at the same time (*e*); and he will be postponed to a mortgage of the estate made to secure a part of the purchase-money advanced by such mortgagee, if he is an assenting party to the mortgage (*f*).

(4.) *Marshalling for lien.*

Marshalling.

The general principles of marshalling are expounded elsewhere (p. 583 *et seq.*), and it is therefore only necessary here to refer to its application in the particular case of a lien.

Lien thrown on the purchased estate.

Following the rule that if one person has two funds to which he may resort, he shall not disappoint another person who can only resort to one of the funds, the Court

(*a*) 15 Ves. 329.
(*b*) *Saunders* v. *Leslie*, 2 Ba. & Be. 509.
(*c*) *White* v. *Wakefield*, 7 Sim. 401.
(*d*) *Smith* v. *Evans*, 28 Beav. 59.
(*e*) *Nairne* v. *Prowse*, *sup.*; *Barker* v. *Smart*, 3 Beav. 64.
(*f*) *Cood* v. *Pollard*, 9 Pri. 544; 10 *ib.* 109.

will, in the event of the death of the vendee, marshal the assets in favour of third persons, so as in case of necessity to compel the vendor to resort to the purchased estate for his money (*g*). At one time it was thought that to do this would be to invade the Statute of Frauds, but it is now well established that, as well in favour of legatees as of creditors, the principle of marshalling will be applied. Legatees, however, can, of course, in this, as in other cases, demand the benefit of marshalling only against those whose claim is weaker than their own—*e.g.*, against the heir taking by descent—not against devisees, who are as much an object of bounty as themselves (*h*).

Against heir.

3. Vendee's lien for prematurely paid purchase-money.

Vendee's lien generally analogous.

Quite analogous to the lien of a vendor on the estate for unpaid purchase-money is the lien of the purchaser in case he has paid the purchase-money or any part of it prematurely, as, for instance, by way of deposit. If the contract is after such payment rescinded, or cannot be enforced owing to want of title in the vendor, or is for any proper reason disclaimed by the purchaser, he has a lien on the estate in the hands of the vendor for the money so paid, with interest thereon, and for his costs (*i*).

The principles applicable to a vendor's lien are equally so here. Thus the taking of another security for the money is not inconsistent with the lien (*k*); it obtains not only against the vendor, but against a subsequent mortgagee who has notice of the payments having been made (*l*); and there is no lien where the contract goes off through the purchaser's own default (*m*).

Sale of land subject to the lien.

If the first purchaser of an estate sells the estate while subject to a lien for prematurely paid purchase-money, and

(*g*) *Trimmer* v. *Bayne*, 9 Ves. 209; *Sproule* v. *Prior*, 8 Sim. 189.

(*h*) *Wythe* v. *Henniker*, 2 My. & K. 635.

(*i*) *Wythes* v. *Lee*, 3 Drew. 396; *Torrance* v. *Bolton*, 14 Eq. 124; 8 Ch. 118.

(*k*) *Wythes* v. *Lee*, *sup.*

(*l*) *Rose* v. *Watson*, 10 H. L. 672.

(*m*) *Dinn* v. *Grant*, 5 De G. & Sm. 451.

the second purchaser also pays his purchase-money prematurely, and afterwards the first contract goes off, the second purchaser then has a lien upon the first purchaser's interest—that is, a lien upon the sum for which the first purchaser has a lien (*n*).

If the vendor is a mortgagee selling under a power of sale, the purchaser's lien attaches only upon the interest of the mortgagee, not to the prejudice of the mortgagor (*o*); but it may affect the interest of persons for whom the mortgagee is a trustee (*o*).

(*n*) *Aberaman* v. *Iron Works* v. *Wickens*, 4 Ch. 101. See now *Fleming* v. *Loe*, (1901) 2 Ch. 594; 70 L. J. Ch. 805.

(*o*) *Wythes* v. *Lee*, *sup.*

Section V.—Equitable Principles Particularly Affecting Mortgages and Sales.

I. *Notice.*
  1. *Definition.*
    (1.) *Actual Notice.*
    (2.) *Constructive Notice.*
  2. *Effects of Notice.*
  3. *Matters analogous to Notice.*

II. *Defence of Purchase for Value without Notice.*
  1. *Where Defendant has Legal Estate.*
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  4. *Active Relief to* bonâ fide *Purchaser.*

III. *Liability of Purchasers for Application of Purchase-money.*
  1. *As to Personalty.*
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IV. *Assignment of Possibilities and Choses in Action.*
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  4. *Judicature Act, s.* 25, *sub-s.* 6.
  5. *Unlawful Assignments.*

I. *Notice.*

1. *Definition.*

By the term "Notice" is meant the transmission to the party under consideration of certain information (*notitia*)

respecting facts, directly or indirectly affecting his rights or liabilities, as viewed by a Court of equity, in relation to certain property.

Notice actual or constructive.

Notice is either actual or constructive.

(1.) Actual notice, or, in other words, express notice, is a term sufficiently clear to need no explanation. It may be either written or oral (except in cases in which a written notice is stipulated for). Vague reports from persons not interested in the property do not, however, amount to notice; nor do mere general assertions that some other persons claim a title (*a*). But knowledge of the facts which is sufficient to operate on the mind of a man of business, may amount to notice although it may be acquired accidentally and not by means of a formal communication (*b*).

Actual notice.

(2.) Constructive notice is nothing other than evidence of notice so strong that the Court will act upon it in the absence of contradiction (*c*).

Constructive notice.

Constructive notice, like constructive fraud, indicates that the presumption of certain facts is so strong that it cannot be safely ignored, although the actual fact (in this case the transmission of the information) may be unsupported by positive evidence. A clear conception as to this can only be reached by means of illustration, and this will be facilitated by the following classification:

Notice of a fact, notice of its causes.

i. *Notice of a fact is notice of its causes;* or, in other words, where there has been actual notice of a fact which would have the effect of putting a reasonable person upon further inquiry, the result will be constructive notice of other facts which would be elicited by such inquiry. The Conveyancing Act, 1882 (*d*), expresses the principle thus: "a purchaser shall not be prejudicially affected by notice

(*a*) *Jolland* v. *Stainbridge*, 3 Ves. 478; *Simpson* v. *Molson's Bk.*, (1895) A. C. 270; 64 L. J. P. C. 51.

(*b*) *Lloyd* v. *Banks*, 3 Ch. 488; *Arden* v. *A.*, 29 Ch. D. 702; 54 L. J. Ch. 655.

(*c*) *Plumb* v. *Fluitt*, 2 Anst. 438.

(*d*) 45 & 46 Vict. c. 39, s. 3.

" of any interest, fact, or thing, unless it is within his own " knowledge or would have come to his knowledge if such " inquiries and inspections had been made as ought " reasonably to have been made."

Notice that legal estate is outstanding,

(*a*) The simplest illustration of this is where a purchaser is informed that the legal estate is in a third person. He is then bound to inquire the reason; and if he does not, he will, nevertheless, be presumed to know the circumstances which have occasioned it, or the terms of a trust attached to the legal estate (*e*). Similarly, actual notice that the title deeds are in the hands of another man will in general be constructive notice of any charge which he may have thereon (*f*). If, however, in such a case a *bonâ fide* inquiry is made for the deeds, and the purchaser is then deceived and put off by a plausible and reasonable excuse for their absence, constructive notice will not be imputed to him (*g*). The Court will clearly impute fraud or gross and wilful negligence in a case where after such notice the purchaser omits all inquiries (*h*). Where the title deeds are in the possession of a solicitor, this does not amount to a constructive notice of the solicitor's lien thereupon, since such possession is ordinary in the course of business, and as a rule the possession is the cause of the lien, rather than the lien the cause of the possession (*i*).

or that the title deeds are held by a third person.

Peculiarities in deeds.

(*b*) Any marked peculiarity in a deed—for instance, the absence or peculiar position of a receipt clause—is considered sufficient to put a person upon inquiry; and if it proves to be connected with the circumstances for which

(*e*) *Anon.*, Freem. 137.

(*f*) *Birch* v. *Ellames*, 2 Anst. 427; *Maxfield* v. *Burton*, 17 Eq. 15; *English & Scottish Merc. Co.* v. *Brunton*, (1892) 2 Q. B. 700; 62 L. J. Q. B. 136.

(*g*) *Hewitt* v. *Loosemore*, 9 Ha. 449; *Exp. Hardy*, 2 D. & C. 393; *Manners* v. *Mew*, 29 Ch. D. 725; 54 L. J. Ch. 909.

(*h*) *Worthington* v. *Morgan*, 16 Sim. 547.

(*i*) *Nat. Prov. Bank* v. *Jackson*, 33 Ch. D. 1; and see *Northern Counties Ins. Co.* v. *Whipp*, 26 Ch. D. 482; 53 L. J. Ch. 629; *Farrand* v. *Yorkshire Bank*, 40 Ch. D. 182; 58 L. J. Ch. 238; *Carritt* v. *R. & P. Advance Co.*, 42 *ib.* 263; 58 L. J. Ch. 688; *Taylor* v. *L. & Coy. Bank*, (1901) 2 Ch. 231; 70 L. J. Ch. 477.

the deed might be set aside, it will be held constructive notice of such circumstances (*k*). It will not, however, be constructive notice of other irregularities in the transaction (*l*). In connexion with this, it must be remembered that now it is sufficient that the receipt clause be either contained in the deed *or* indorsed thereon. In either case it is, in favour of a subsequent purchaser not having notice that the consideration was not in fact paid or given, sufficient evidence of the payment (*m*).

Occupation by third person.

(*c*) As a general rule, if a person purchases an estate which he knows to be in the occupation of another than the vendor, the fact of such occupation is sufficient to put him upon inquiry. He will therefore be presumed to be aware of and will be bound by all equities which such occupier may have in the land. The purchaser has, in short, actual notice of a fact affecting the property and constructive notice of the circumstances which give rise to it (*n*). If the tenancy is under a lease, he will be held to have notice of the tenant's rights (*o*), but not of the lessor's title and rights (*p*). If the tenant in possession has entered into a contract for the purchase of the estate, a subsequent purchaser will be held to have notice of the contract (*q*). If two persons are together carrying on business on the property, their possession is constructive notice of the title of the partnership (*r*). The same notice is not, however, implied as between the vendor and purchaser while the matter in still in contract; that is to say, though the subsequent purchaser, if he completes his contract, is bound by the equities of the previous purchaser, he cannot be compelled by the vendor to complete a contract which he had entered into in ignorance of those

(*k*) *Kennedy* v. *Green*, 3 My. & K. 699.

(*l*) *Greenslade* v. *Dare*, 20 Beav. 284.

(*m*) 44 & 45 Vict. c. 41, ss. 54, 55.

(*n*) *Trinidad Asphalte Co.* v. *Coryat*, (1896) A. C. 587; 65 L. J. P. C. 100.

(*o*) *Taylor* v. *Stibbert*, 2 Ves. jr. 437, 440.

(*p*) *Hunt* v. *Luck*, (1901) 1 Ch. 45; 70 L. J. Ch. 30; affd. (1902) 1 Ch. 428.

(*q*) *Daniels* v. *Davison*, 16 Ves. 249; 17 Ves. 433.

(*r*) *Cavander* v. *Bulteel*, 9 Ch. 79.

equities, on the ground that the possession was constructive notice thereof (*s*). It is plain that an innocent first incumbrancer does not stand on the same footing as a vendor, who is under at least a moral obligation to make full disclosure of any burdens on the property of which he is negotiating a sale (*t*).

Actual notice of tenancy.

On the same principle, actual notice that an occupier holds as a tenant of a particular person is constructive notice of the title of the latter (*u*); and actual notice that the tenants pay their rents to a particular person is constructive notice of the terms of their tenancy (*x*).

Visible appearance of property.

(*d*) The visible appearance of the property in question may be such as to put a purchaser upon inquiry, thus amounting to constructive notice of certain rights respecting it. Thus the fact that there were fourteen chimney-pots upon a house in which there were only twelve flues was held to amount to constructive notice of an easement for the passage of the smoke of an adjoining owner (*y*). The existence of an archway was considered notice of a right of way under it (*z*); and the existence of a sea-wall, notice of an obligation for its maintenance and repair (*a*). The existence of windows is not, however, constructive notice of an agreement giving a right to the access of light to them, since windows are frequently made where they are liable to be obstructed, the builder being content to take his chance of acquiring a right by prescription (*b*).

Notice of a deed is notice of its contents.

ii. *Notice of a deed is notice of its contents.*

It is immaterial whether from the description of the parties, or from the recitals or from any other part of the deed, the purchaser would be enabled to discover an interest prior to his own. He must be presumed to be

(*s*) *Caballero* v. *Henty*, 9 Ch. 447; *Potter* v. *Sanders*, 6 Ha. 1.
(*t*) *Re Holmes*, 29 Ch. D. 786.
(*u*) *Bailey* v. *Richardson*, 9 Ha. 734.
(*x*) *Knight* v. *Bowyer*, 2 De G. & J. 421; *Hunt* v. *Luck*, (1901) 1 Ch. 45; 70 L. J. Ch. 30; affd. (1902) 1 Ch. 428.
(*y*) *Hervey* v. *Smith*, 22 Beav. 299.
(*z*) *Davies* v. *Sear*, 7 Eq. 427.
(*a*) *Morland* v. *Cook*, 6 Eq. 252.
(*b*) *Allen* v. *Seckham*, 11 Ch. D. 790.

acquainted with the whole contents, and therefore with other deeds to which it necessarily refers (*c*). Thus a conveyance by persons interested as devisees is notice of the will by which they claim (*d*); notice of a lease is notice of the covenants therein (*e*); and this, notwithstanding that by the Vendor and Purchaser Act, 1874, a lessee is not entitled to look into his lessor's title without an express stipulation for that purpose. If he chooses to remain in an ignorance which he might have avoided he must take the consequences (*f*). An agreement for a *purchase* of a lease does not, however, so affect the purchaser with constructive notice of unusual and onerous covenants contained therein as to render him liable to complete the purchase in spite thereof, unless before the agreement he had a fair opportunity of ascertaining the terms of the covenants (*g*).

A person is not, however, presumed from one deed to have notice of another referred to therein which does not necessarily affect the property in question, and which he is told does not affect it (*h*). Where in particulars of sale there is a bare reference to a deed which the purchaser can inspect, he will be bound by its contents; but if the vendor purports to state what the contents are, the purchaser may reasonably rely thereupon, and will not be affected by any inaccuracies in the vendor's statement (*i*).

iii. *Actual notice to an agent is constructive notice to his principal.*

Notice to agent is notice to principal.

It is well established that notice to the agent, solicitor, or counsel of a purchaser is constructive notice to him-

(*c*) *Bisco* v. *E. of Banbury*, 1 Ch. Ca. 287; *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291; *Davies* v. *Thomas*, 2 Y. & C. Ex. 234; *Re Coxe & Neve's Contract*, (1891) 2 Ch. 109.

(*d*) *Burgoyne* v. *Hatton*, Barn. Ch. Rep. 237.

(*e*) *Taylor* v. *Stibbert*, 2 Ves. jr. 437.

(*f*) *Patman* v. *Harland*, 17 Ch. D. 353; 50 L. J. Ch. 642.

(*g*) *Reeve* v. *Berridge*, 20 Q. B. D. 523; 57 L. J. Q. B. 265; *Hyde* v. *Warden*, 3 Ex. D. 72; *Re White and Smith's Contract*, (1896) 1 Ch. 637; 65 L. J. Ch. 481.

(*h*) *Jones* v. *Smith*, 1 Ha. 43; *Williams* v. *W.*, 17 Ch. D. 443.

(*i*) *Cox* v. *Coventon*, 31 Beav. 378.

self (*k*); and the same rule applies though the same person may act as agent of both vendor and purchaser (*l*), or both mortgagor and mortgagee (*m*); and notice to one of two or more trustees is binding (*n*). But new trustees are not fixed with notice, through retiring trustees, of incumbrances affecting the trust estate, the existence of which is not disclosed to them (*o*). An assignee of a reversionary interest who gives notice to the existing trustees is under no obligation to give any further notice, but has priority over a subsequent assignee who has given notice to the subsequently appointed trustees (*p*).

Limitation of this principle. C. A. 1882.

As to this species of constructive notice, the Conveyancing Act, 1882, provides that notice is not to prejudice a purchaser unless in the same transaction with respect to which the question arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such if such inquiries and inspections had been made as ought reasonably to have been made (*q*).

Notice must be in the same transaction,

and of material facts.

This limitation of the doctrine to cases in which the notice was given in the same transaction relieves purchasers from a liability which was dangerous as the law previously stood. It is to be observed further that the notice, in order to be imputed to the principal, must be notice of facts material to the question at issue, and such as it is the duty of the agent to communicate (*r*). The employment of a solicitor to do a merely ministerial act, such as to procure the execution of a deed, does not so

Solicitor employed only ministerially.

(*k*) *Sheldon* v. *Cox*, 2 Ed. 228; *Newstead* v. *Serles*, 1 Atk. 265.

(*l*) *Fuller* v. *Bennet*, 2 Ha. 402; *Tweedale* v. *T.*, 23 Beav. 341.

(*m*) *Re Hampshire Land Co.*, (1896) 2 Ch. 743; 65 L. J. Ch. 860.

(*n*) *White* v. *Ellis*, (1892) 1 Ch. 188; 61 L. J. Ch. 178; *Ward* v. *Duncombe*, (1893) A. C. 369; 62 L. J. Ch. 881.

(*o*) *Hallows* v. *Lloyd*, 39 Ch. D. 686; 58 L. J. Ch. 105.

(*p*) *Britten* v. *Partridge*, (1899) 1 Ch. 163; 68 L. J. Ch. 117.

(*q*) 45 & 46 Vict. c. 39, s. 3; *Bailey* v. *Barnes*, (1894) 1 Ch. 25; 63 L. J. Ch. 73.

(*r*) *Wyllie* v. *Pollen*, 32 L. J. Ch. N. S. 782; *English, &c. Mercantile Trust* v. *Brunton*, (1892) 2 Q. B. 700.

constitute him an agent as that notice to him shall be constructive notice to his employer (*s*).

If a solicitor acting for both parties is guilty of a concealment from one of them with the cognisance of the other, the former is not affected with constructive notice (*t*), nor if he is himself the author of a distinct fraud in the same transaction is his knowledge thereof imputed to the employer (*u*), since it is not to be presumed that the solicitor would make a disclosure of such a fact (*x*). The mere fact of his having been guilty of fraud at some other time in respect of the same property will not prevent the imputation of his knowledge in accordance with the ordinary rule (*y*).

Solicitor guilty of fraudulent concealment.

2. *Effects of Notice.*

(1.) A purchaser for value without notice is, as we have seen, in many respects favoured in equity. It is well established that a person who purchases an estate after notice of a prior equitable right makes himself a *malâ fide* purchaser, and will not be able to defeat the prior right by getting in the legal estate for his protection. On the contrary, he will be held a trustee for the benefit of the person whose right he sought to defeat; and he secures no better position than that of the person who conveys to him (*z*).

Perhaps the most frequent illustrations of the principle are afforded by cases in which a person purchases, or takes a legal mortgage of an estate with notice of a prior equitable mortgage by deposit of title deeds (*a*), or of a prior equitable lien for unpaid purchase-money (*b*), and those

(*s*) *Wyllie* v. *Pollen, sup.;* and see *Re Cousins*, 31 Ch. D. 671; 55 L. J. Ch. 662.

(*t*) *Sharpe* v. *Foy*, 4 Ch. 35.

(*u*) *Kennedy* v. *Green*, 3 My. & K. 699; *Cave* v. *C.*, 15 Ch. D. 639.

(*x*) *Waldy* v. *Gray*, 20 Eq. 238; and see 53 & 54 Vict. c. 39, s. 16.

(*y*) *Atterbury* v. *Wallis*, 8 De. G. M. & G. 454; *Boursot* v. *Savage*, 2 Eq. 134.

(*z*) *Potter* v. *Sanders*, 6 Ha. 1; 55 L. J. Ch. 33; *Re A. D. Holmes*, 29 Ch. D. 786; 55 L. J. Ch. 33; *Trinidad Asphalte Co.* v. *Coryat*, (1896) A. C. 587; 65 L. J. P. C. 100.

(*a*) *Birch* v. *Ellames*, 2 Anst. 427.

(*b*) *Mackreth* v. *Symmons*, 15 Ves. 349.

cases in which a person purchases with notice of a trust (*c*).

Effect of registration.

(2.) It is established that where registration is required an earlier registration will not, in the absence of express statutory enactment to that effect, suffice to gain priority in the face of notice of the unregistered deed (*d*). But if the second transaction was without notice at its inception, priority may then be gained by a registration made after knowledge of the earlier unregistered, or defectively registered, deed has been acquired (*e*). Registration, moreover, under the English Acts (excepting the Yorkshire Registries Act, 1884), is not of itself notice; so that a prior equitable incumbrance will not, though registered, affect a subsequent purchaser without notice who obtains the legal estate (*f*). The Irish Registration Act (*g*) is differently framed, and expressly gives priority to instruments in the order of their registration (*h*).

Registration not notice.

Secus in Ireland.

Purchase with notice from a person without notice.

(3.) Where a person purchases for valuable consideration, but with notice of a prior charge, from a person who acquired his interest without notice of it, he may protect himself behind the *bona fides* of the first purchaser (*i*). At first sight this seems inconsistent with the principle that personal *mala fides* disentitles to protection; but it is evident that if it were otherwise the first *bonâ fide* purchaser would be the sufferer, inasmuch as he would be unable to get full value for the property which he innocently acquired.

Purchase without notice from a person who has notice.

Conversely, if a person who has notice sells to a *bonâ fide* purchaser who has no notice, and the latter secures the *legal* title, he is protected against a prior charge (*k*). But

(*c*) *Dunbar* v. *Tredinnick*, 2 Bull. & B. 319.

(*d*) *Le Neve* v. *Le N.*, Amb. 436; but see now, Yorkshire Registries Act, *sup.* p. 331.

(*e*) *Elsey* v. *Lutyens*, 8 Ha. 159; *Essex* v. *Baugh*, 1 Y. & C. Ch. C. 620.

(*f*) *Morecock* v. *Dickins*, Amb. 679.

(*g*) 6 Anne, c. 2.

(*h*) *Bushell* v. *B.*, 1 S. & L. 98.

(*i*) *Lowther* v. *Gordon*, 2 Atk. 242.

(*k*) *Harrison* v. *Forth*, Prec. Ch. 51; *Taylor* v. *Russell*, (1892) A. C. 261; 61 L. J. Ch. 657.

no protection is secured by getting in the legal estate if at the time of doing so the mortgagee or purchaser has notice that the legal estate is held on an express trust in favour of persons who assert a claim to the property (*l*).

If, however, a merely equitable interest is dealt with in this case, the result is different, since persons purchasing equitable interests take them subject to all equities affecting them. The assignor cannot give the assignee any greater interest than he himself has—namely, an interest subject to the charge of which he had no notice (*m*).

Notice effectual if before payment or conveyance.

(4.) Notice before actual payment of the purchase-money is sufficient to bind a purchaser, as efficiently as notice previous to his contract, for this gives him an opportunity of rescinding his contract in equity (*n*). And conversely, notice before the execution of the conveyance is binding, although the purchase-money may have been paid before notice, for the purchaser may secure himself by retaining the legal estate (*o*).

3. *Matters analogous to notice.*

(1.) The registration of an action as a *lis pendens* is binding on subsequent purchasers, taking effect from the date of service of the writ (*p*). The statement of a special case amounts to a *lis pendens*, and is binding when registered. Re-registration every five years is necessary (*q*). The effect of registration of *lis pendens* is, however, confined to land and does not apply to personalty other than chattel interests in land (*r*).

The principle applies as well to dealings of the plaintiff as to those of the defendant. Neither party may alien the

(*l*) *Taylor* v. *L. & C. Bank*, (1901) 2 Ch. 231; 70 L. J. Ch. 477.

(*m*) *Ford* v. *White*, 16 Beav. 120; *Harpham* v. *Shacklock*, 19 Ch. D. 207.

(*n*) *Tourville* v. *Naish*, 3 P. Wms. 307.

(*o*) *Wigg* v. *W.*, 1 Atk. 382; *Sparke* v. *Foy*, 4 Ch. 35.

(*p*) *B. of Winchester* v. *Payne*, 11 Ves. 197; *Schofield* v. *Solomon*, 52 L. T. 679.

(*q*) 2 & 3 Vict. c. 11, s. 7.

(*r*) *Wigram* v. *Buckley*, (1894) 3 Ch. 483; 63 L. J. Ch. 689.

property in dispute to the prejudice of the other (*s*). It is necessary, however, that some specific claim should have been made in the suit to the particular property in question (*t*). Thus, an action for a general account does not bind all the real and personal estate to which it relates (*u*). A *lis pendens*, again, does not create a charge or lien upon the property; it merely puts a purchaser upon an inquiry as to the validity of the plaintiff's claim (*x*).

Effect of.

Registration of deeds.

(2.) It has been seen that the registration of deeds is not constructive notice so as to affect a purchaser taking the legal estate (*y*); but if a purchaser search the register he will be presumed to have notice thereof, unless he can show that the search did not extend to the time of the actual registration (*z*). Similarly, under the former law, judgments were not notice unless a search had actually been made (*a*). By 23 & 24 Vict. c. 38, it was enacted that no judgment, statute, or recognisance should affect any land as to a *bonâ fide* purchaser for value, although with actual notice, unless a writ of execution was issued within three months of the registration; and now, by 27 & 28 Vict. c. 112, no judgment, statute, or recognisance affects any land until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, and by 51 & 52 Vict. c. 51, an execution or receivership order must now, to be effective, be registered in the Land Registry, and the registration renewed every five years (*b*).

Judgments.

23 & 24 Vict. c. 38;

27 & 28 Vict. c. 112.

Provision is made by the Conveyancing Act, 1882 (*c*), for the making of official searches, on the request of a purchaser or other interested person, for judgments, deeds,

(*s*) *Bellamy* v. *Sabine*, 1 De G. & J. 566, 580.
(*t*) *Holt* v. *Dewell*, 4 Ha. 446.
(*u*) *Walker* v. *Flamstead*, 2 Ld. Ken., pt. 2, 57, 59; *Exp. Thornton*, 2 Ch. 176.
(*x*) *Bull* v. *Hutchens*, 32 Beav. 615.
(*y*) See *Bushell* v. *B.*, 1 S. & L. 103.
(*z*) *Hodgson* v. *Dean*, 1 S. & S. 221.
(*a*) *Lane* v. *Jackson*, 26 Beav. 535.
(*b*) Sect. 5.
(*c*) 45 & 46 Vict. c. 39, s. 2.

lites pendentes, and other matters affecting title: and the official certificate given is conclusive in favour of a purchaser, as against persons interested under or in respect of such judgments, deeds, &c. (*d*).

II. *Defence of Purchase for Value without Notice.*

General rule. *Basset* v. *Nosworthy*.

A general rule laid down in the leading case of *Basset* v. *Nosworthy* (*e*) was that equity would give no assistance to the legal title against a *bonâ fide* purchaser without notice of an adverse title. This was a case arising out of the auxiliary jurisdiction of Courts of equity which is now obsolete; but the principles involved are still in a measure applicable, though under another form.

Three cases may arise in which a defendant may plead that he is a purchaser for valuable consideration without notice. Either the plaintiff in equity may have an equitable title, and may seek the assistance of the Court to establish it against a defendant who has secured the legal estate; or the legal estate may be outstanding, and the parties before the Court set up conflicting equitable interests; or the plaintiff may himself have the legal estate, and may be seeking to add to it the equitable interest as well.

1. *Where the defendant has the legal estate.*

Where defendant has legal estate equity will not relieve.

No maxim is better known than that "*where the equities are equal the law shall prevail.*" Acting in conformity with this rule, Courts of equity will uniformly acknowledge the defence of a defendant who has the legal estate, and

(*d*) See also for searches under Yorkshire Registries Act, 47 & 48 Vict. c. 54, s. 20.

(*e*) Rep. t. Finch, 102; 2 W. & T. L. C. 1.

who pleads that he is a purchaser for value without notice. It will in such a case refuse to assist the plaintiff, but will leave the parties to the position in which the law places them (*f*). This may be thus illustrated:—A., the owner of an estate, contracts to sell it to B., and B. pays a part of the purchase-money before the estate is legally conveyed to him. A. then sells the estate to C., who has no knowledge of the transaction with B.; C. pays his purchase-money, and the estate is legally conveyed to him. If, then, B. comes into equity to seek to enforce against the estate the lien to which as a purchaser equity would under other circumstances have held him entitled, the relief will be refused to him. It will be held that C. has as good a right in conscience to the full enjoyment of his estate as B. has to security for his prematurely paid purchase-money; equity, therefore, will refuse to interfere with the advantage which he derives from his legal position.

Legal estate subsequently acquired.

If the defendant who pleads his *bonâ fide* purchase for value without notice has not secured the legal estate at the time of his purchase, but has subsequently acquired it, his plea is equally good; and this notwithstanding that in the interval between his purchase and his acquiring the legal title he may have had notice of the prior transaction of the plaintiff (*g*). His own equity being equal to the plaintiff's, he will not be deprived of the advantage which he gains through his superior activity and diligence. Indeed, where his original position in equity has been secured in good faith, the Courts have been little scrupulous to inquire how he has come by the legal estate. Moreover, a purchaser will not be deemed to have notice of a prior equity merely because he gets the legal estate through an instrument which discloses that equity, if he had no knowledge of such instrument at the time of his purchase (*h*).

(*f*) *Pilcher* v. *Rawlins*, 7 Ch. 259.

(*g*) *Goleborn* v. *Alcock*, 2 Sim. 552; *Blackwood* v. *London, &c. Bank*, 5 L. R. P. C. C. 111.

(*h*) *Pilcher* v. *Rawlins, sup.*; and see *Newman* v. *N.*, 28 Ch. D. 674; 54 L. J. Ch. 598; *Taylor* v. *Russell*, (1892) A. C. 244; (1891) 1 Ch. 8; 61 L. J. Ch. 657.

Sir W. M. James, L. J., there said: "When once you "have arrived at the conclusion that the purchaser is a "purchaser for valuable consideration without notice, the "Court has no right to ask him how he is going to defend "himself, or what he is going to rely on."

Legal estate no protection if acquired by a breach of trust.

There is, however, this limitation upon the power of a purchaser to secure himself by subsequently acquiring the legal estate: he cannot do so by becoming a party to a breach of trust. Thus it will not avail him to take a conveyance from a trustee when he has knowledge of the trust. If he does so, he himself becomes a trustee, and the legal estate will be no assistance to him (*i*). Thus a trustee for successive incumbrancers cannot, by conveying the legal estate to one of them, confer on him priority over the others (*k*).

Where defendant has best right to call for the legal estate.

Not only where the defendant purchaser has the legal estate, but where he has the best right to call for it, equity will not grant relief against him. This will be the case where one of two or more persons who are interested in equity has, in addition to the interest which he holds in common with the others, a special equity peculiar to himself—for instance, a particular declaration of trust in his favour (*l*), or has by superior diligence secured possession of the title deeds. Where there has been no negligence on the part of the prior claimant, nothing less than the completion of the legal title by the subsequent claimant will give him priority (*m*). And of course a purchaser for value would have a better right than a volunteer (*n*).

Same rule where the plaintiff

Where, moreover, there are circumstances which give rise to a mere equity as distinguished from an equitable

(*i*) *Saunders* v. *Dehew*, 2 Vern. 271; *Allen* v. *Knight*, 5 Ha. 272; 11 Jur. 527; *Taylor* v. *London & County Bank*, (1901) 2 Ch. 234; 70 L. J. Ch. 477.

(*k*) *Collyer* v. *Finch*, 19 Beav. 500; 5 H. L. 905; *Harpham* v. *Shacklock*, 19 Ch. D. 207.

(*l*) *Willoughby* v. *W.*, 1 T. R. 763; *Wilmot* v. *Pike*, 5 Ha. 14; *Hartopp* v. *Huskisson*, 55 L. T. R. 773; *London & County Bank* v. *Goddard*, (1897) 1 Ch. 642; 66 L. J. Ch. 261.

(*m*) *Moore* v. *N. W. Bank*, (1891) 2 Ch. 599; 60 L. J. Ch. 627.

(*n*) *Buckle* v. *Mitchell*, 18 Ves. 100.

asserts a mere equity.

estate—as, for example, to set aside a deed for fraud, or to correct a mistake—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere against him (*o*).

2. *Where the legal estate is outstanding.*

Where legal estate is outstanding, priority determined by time.

Where the legal estate is outstanding, another maxim is applicable—*Qui prior est tempore potior est jure.* Thus the defence of a purchase for value without notice will not avail against a prior equitable incumbrancer. It is a well-known principle, elsewhere fully expounded (*p*), that a third mortgagee who lent his money without notice of the second mortgage may gain priority over that incumbrance by buying in the first mortgage with the legal estate. But no such priority would be gained if the first was a merely equitable mortgage (*q*), nor would the incumbrancer who is later in time gain priority by being the first to give notice of his incumbrance (*r*).

Fund in Court or legal estate in trustee.

Where, however, a fund is in Court, or the legal estate is outstanding in a trustee, and the estate is claimed by several adverse but innocent purchasers for value without notice, the Court will declare the right to the fund, will make a decree against some one or more of the purchasers for value, and will then, to give effect to its decree, order the delivery up of the title deeds to the person held to have the best title (*s*). And where an executor mortgaged trust property by a deposit of title deeds, the mortgage was postponed to the *cestui que trust*, whose claim was prior in time (*t*).

(*o*) *Phillips* v. *P.*, 4 De G. F. & J. 208; *Sturge* v. *Starr*, 2 My. & K. 195.

(*p*) *Sup.* pp. 300 *et seq.*

(*q*) *Phillips* v. *P.*, 4 De G. F. & J. 208; *Brace* v. *D. of Marlborough*, 2 P. Wms. 491.

(*r*) *Humber* v. *Richards*, 45 Ch. D. 589; 59 L. J. Ch. 728; *Hopkins* v. *Hemsworth*, (1898) 2 Ch. 347; 67 L. J. Ch. 526; *Powell* v. *L. & P. Bank*, (1893) 2 Ch. 555; 1 Ch. 610; 62 L. J. Ch. 795; *Roots* v. *Williamson*, 38 Ch. D. 485; 57 L. J. Ch. 995.

(*s*) *Stackhouse* v. *C. of Jersey*, 1 J. & H. 721; *Newton* v. *N.*, 4 Ch. 144; *Cooper* v. *Vesey*, 20 Ch. D. 611; 51 L. J. Ch. 862.

(*t*) *Pillgrem* v. *P.*, 18 Ch. D. 93; 52 L. J. Ch. 834.

Where a trustee has committed a breach of trust, and has afterwards made that default good by applying another trust fund for that purpose, the Court will not deprive the first *cestuis que trusts* of the fund thus placed at their disposal at the expense of the *cestuis que trusts* of the second fund. The former are considered as purchasers for value without notice, and so entitled to protection (*u*).

Trustee making good one breach of trust by another.

3. *Where the plaintiff has the legal estate.*

Previous to the Judicature Act (*x*), when a plaintiff who had the legal estate sought the assistance of equity to perfect his interest, and the defendant pleaded a *bonâ fide* purchase for value without notice, a distinction was taken according to the nature of the relief which he asked.

Where the plaintiff had legal estate,

It might be that, as in *Basset* v. *Nosworthy* (*y*), he desired to obtain from the defendant discovery of some instrument relating to the title, or some similar assistance which could not be afforded to him by a Court of law. In other words, his application might be to the *auxiliary* jurisdiction of the Court. Or, on the other hand, the plaintiff might sue in equity in a matter in which the Court of Chancery exercised a legal jurisdiction concurrently with the Courts of law.

In the former case it was well established that if the defendant successfully maintained a plea of purchase for value without notice, equity would not assist the plaintiff against him (*z*). It mattered not that the plaintiff was actually in possession of the property under a legal title (*a*), or whether the property in question was real or personal estate (*b*). The reasoning was that the defendant had an equal claim with the plaintiff in equity, and that equity would therefore not interfere with his rights.

and appealed to auxiliary jurisdiction, Court would not assist him.

(*u*) *Thorndyke* v. *Hunt*, 3 De G. & J. 563; *sup.* p. 139.
(*x*) 36 & 37 Vict. c. 66.
(*y*) *Sup.* p. 347.
(*z*) *Burlase* v. *Cooke*, Freem. 24; *Jerrard* v. *Saunders*, 2 Ves. 454.
(*a*) *Wallwyn* v. *Lee*, 9 Ves. 24; *Joyce* v. *De Moleyns*, 2 J. & L. 374.
(*b*) *Dawson* v. *Prince*, 2 De G. & J. 41.

Secus where he appealed to the concurrent jurisdiction.

In the latter case, however, it was held that the same plea would not avail. Where a widow filed a bill claiming dower against a purchaser for value without notice from her husband, the plea of the purchase for value was overruled (*c*); and the same was the case in a bill for tithes (*d*); the true ground for the decisions being that the Court was not there asked to give to the plaintiff any equitable as distinguished from legal relief (*e*).

Legal mortgagee seeking foreclosure entitled to relief.

The case of a legal mortgagee seeking foreclosure is in some respects exceptional. He is entitled to a decree against a *bonâ fide* purchaser, notwithstanding that the latter advanced his money without notice of the prior incumbrance (*f*). In this case the plaintiff seeks an equitable remedy attached to his legal right, with respect to which he cannot be told to seek his remedy at law; so that his position differs from that of a plaintiff who through the medium of a Court of equity seeks to enforce a legal claim. But though he might get his foreclosure decree, it was held that he was not entitled at the same time to an order for the delivery of title deeds, as to which the defence would avail just as if a suit had been instituted for that purpose alone (*g*). And for the same reason the Court would not decree a sale instead of a foreclosure, under 15 & 16 Vict. c. 86, since the completion of the sale would involve a surrender of the title deeds, which the Court would not insist on (*h*).

Effect of Jud. Act, 1873, s. 24, sub-s. 6.

But by the Judicature Act (*i*) every Court can now enforce both legal and equitable claims (*k*), and recognise equitable defences (*l*). There is, therefore, no longer any distinction between the auxiliary and the concurrent jurisdiction of the Courts of equity; and the same reasoning which applied to *Williams* v. *Lambe* and *Collins* v. *Archer*

(*c*) *Williams* v. *Lambe*, 3 Bro. C. C. 264.
(*d*) *Collins* v. *Archer*, 1 R. & M. 284.
(*e*) *Phillips* v. *P.*, 4 De G. F. & J. 208, 217.
(*f*) *Finch* v. *Shaw*, 19 Beav. 500.
(*g*) *Heath* v. *Crealock*, 10 Ch. 22.
(*h*) *Waldy* v. *Gray*, 20 Eq. 238.
(*i*) 36 & 37 Vict. c. 66.
(*k*) Sect. 24, sub-s. 6.
(*l*) Sub-s. 2.

would now apply to such cases as *Basset* v. *Nosworthy* and *Wallwyn* v. *Lee*. This enactment, therefore, has the effect of requiring the Courts now to consider on their merits all cases in which this defence is raised (*m*).

4. *Where a bonâ fide purchaser is plaintiff.*

The purchaser may sometimes come as plaintiff.

In some cases equity will allow more than a merely negative force to the position of a *bonâ fide* purchaser for value. It will suffer him to come as a plaintiff to seek the delivery up and cancellation of documents which stand in the way of his complete security. Thus sleeping mortgages or incumbrances, under which no claim has been made for a long time, will be vacated in his favour (*n*).

III. *Liability of Purchasers for Application of Purchase-Money.*

Since the decision in *Elliot* v. *Merryman* (*o*), which has long been quoted as a leading authority on the liability of purchasers from trustees to see to the application of the purchase-money, the whole law on the subject has been put on a different footing by the statutes to be presently referred to. These statutes, however, being of comparatively recent date, and not retrospective, there still occur many cases to which the old law is applicable. It is, therefore, necessary to consider first the principles applied by Courts of equity in cases where the statutes are not applicable; secondly, the operation of the statutes.

1. *As to personal property.*

(1.) However personal estate may be bequeathed, it must be first resorted to by the executors or adminis-

(*m*) *Ind, Coope & Co.* v. *Emmerson*, 12 App. Cas. 300; 33 Ch. D. 323; 56 L. J. Ch. 989; *Kennedy* v. *Lyell*, 9 App. Cas. 81.

(*n*) *Rutter* v. *Bartley*, Toth. 160; *Abdy* v. *Loveday*, Rep. t. Finch, 250. See *inf.* p. 802.

(*o*) 2 Atk. 4; 1 W. & T. L. C. 64.

trators for payment of the testator's debts, in a due course of administration. The general rule is abundantly established that a person who purchases or takes a mortgage of leaseholds or other personalty from an executor or administrator is not bound to see to the application of the purchase or mortgage money. The sale or mortgage of a chattel by an executor will be good against both the residuary and pecuniary legatees, as well as against the creditors of the testator. Their remedy, in case of the misapplication of the money by the executor, would be not against the purchaser or mortgagee, but against the executor himself; neither notice of the will, nor of the bequest contained therein, would be prejudicial to the purchaser or mortgagee (*p*). And the fact that a mortgage of part of the assets has been made to secure a debt originally contracted on the personal security of the executor, and without reference to the assets, is immaterial (*q*).

Purchaser of personalty not generally liable.

Notice immaterial.

Exceptions: 1. Where there is a particular trust of personalty. 2. Where purchaser is party to a fraud.

(2.) The Master of the Rolls, in *Elliot* v. *Merryman* (*r*), recognised two exceptions from the general rules. First, where the personal estate is clothed with such a particular trust that the Court may require a purchaser thereof to see the money rightly applied. Secondly, where there is fraud on the part of a purchaser or mortgagee; as, for instance, where to his knowledge the executor applies the testator's assets in payment of his own debt (*s*).

2. *As to real property.*

Land devised for payment of debts.

(1.) Land devised on trust for sale for payment of debts, &c.

Contrast of law and equity.

At law trustees in whom real property was vested could of course give a valid discharge for the purchase-money.

(*p*) *Ewer* v. *Corbett*, 2 P. Wms. 148; *Andrew* v. *Wrigley*, 4 Bro. C. C. 125; *Re Whistler*, 35 Ch. D. 561; 56 L. J. Ch. 827; *Re Venn and Furze*, (1894) 2 Ch. 101; 63 L. J. Ch. 303.

(*q*) *Miles* v. *Durnford*, 2 De G. M. & G. 641.

(*r*) 2 Atk. 4.

(*s*) *Hill* v. *Simpson*, 7 Ves. 152; *Pillgrem* v. *P.*, 18 Ch. D. 93; 52 L. J. Ch. 834.

But the persons amongst whom the produce of the sale was to be distributed being considered in equity the owners, Courts of equity held that a purchaser must obtain a discharge from them, unless the power of giving receipts was either expressly or by implication given to the trustees. And if no such discharge was given, and the trustees had no power to give receipts, the estate, upon a misapplication of the purchase-money, remained chargeable in the hands of the purchaser.

Where ex-press power to give receipts provided.

Where a power of giving receipts was in express terms conferred upon trustees, the purchaser was not, in the absence of fraud or collusion, bound to see to the application of the purchase-money. If no such power was given in express terms, there was frequent difficulty in determining whether such a power could be implied.

Power, when implied.

As to this, one of the rules laid down in *Elliot* v. *Merryman* (*t*), which was invariably followed, was that if the testator directed lands to be sold for the payment of certain debts, mentioning in particular to whom those debts were owing, the purchaser was bound to see that the money was applied for the payment of those debts. And the same rule was applicable where there was a trust for payment of legacies or annuities, which from their nature were placed on the same footing as specified or scheduled debts (*u*). In cases coming within this rule, the trusts being of a limited and definite nature, and such as a purchaser might without inconvenience see properly performed, a power to give receipts could not be implied.

Not in case of scheduled debts and legacies.

But otherwise where trust was for payment of debts generally;

Another rule was that if the testator directed the land to be sold for the payment of *debts generally*, the purchaser was not bound to see the money rightly applied. In such cases it was esteemed that the trust was of too general and unlimited a nature to be undertaken by a purchaser; and it was therefore held that an implied power was bestowed

(*t*) *Supra.*
(*u*) *Johnson* v. *Kennett*, 3 My. & K. 624, 630; *Horn* v. *H.*, 2 S. & S. 448.

on the trustees to give receipts in full discharge for the purchase-money.

though followed by trust to pay legacies.

If the trust included at the same time the payment of legacies and annuities and the payment of debts, the latter principle was clearly the one to be applied, since it was only after the execution of the general trust to pay debts that the limited trust to pay legacies would arise. The purchaser's position, therefore, would be just the same as in a general trust for payment of debts only (*x*).

Annuities not distinguishable from legacies.

In some cases it was sought to distinguish annuities from legacies (*y*), but neither on principle or authority could such a distinction be supported. And if there was a general charge of debts it was held immaterial that one particular debt was mentioned (*z*). And, again, where there was a trust for payment of debts generally and also legacies, a purchaser, even after the debts had in fact been paid, was held not liable to see to the application of the purchase-money in payment of the legacies (*a*). Lord Lyndhurst in so deciding pointed out that the rule had reference to the state of things at the death of the testator (*b*). And it made no difference if in fact there were no debts when the testator died.

Immaterial that debts have in fact been paid,

or that there were no debts.

Trusts declared involving personal discretion.

Where money to arise from a sale was not merely to be paid to certain persons, but was to be applied by the trustees upon trusts requiring care and discretion, the presumption was that the settlor intended to confide the execution of the trust to the trustees solely, and the purchaser was not then bound to see to the application of the purchase-money (*c*), and so where an estate was charged with a sum of money payable to an infant on his attaining his majority (*d*).

(*x*) *Johnson* v. *Kennett*, 3 My. & K. 624; *Page* v. *Adam*, 4 Beav. 269.

(*y*) *Johnson* v. *Kennett*, *sup.*; *Eland* v. *E.*, 1 Beav. 235.

(*z*) *Robinson* v. *Lowater*, 17 Beav. 592; 5 De G. M. & G. 272.

(*a*) *Johnson* v. *Kennett*, *sup.*

(*b*) *Stroughill* v. *Anstey*, 1 De G. M. & G. 635. See also *Forbes* v. *Peacock*, 1 Ph. 717.

(*c*) *Doran* v. *Wiltshire*, 6 Swanst. 699.

(*d*) *Dickenson* v. *D.*, 3 Bro. C. C. 19.

A purchaser was not bound to ascertain how much land it was necessary to sell for payment of the debts (*e*). And where lands were devised to trustees upon trust to raise so much money as the personal estate should fall deficient in paying the testator's debts and legacies, a purchaser was not bound to inquire whether the real estate was wanted or not. *Secus*, however, if the trustees had merely a *power* to raise money upon the deficiency of the personal estate, for then, unless there was a deficiency the power never arose, and consequently the purchaser could take no estate by the supposed execution of it (*f*).

Purchaser not bound to inquire whether sale was necessary,

unless power to sell only arose on deficiency.

(2.) Land devised charged with debts, &c.

It was laid down in *Elliot* v. *Merryman* (*g*) that the rules as to a purchaser's liability were the same where land was devised charged with debts or legacies, or both, as where it was devised expressly upon trust for these purposes, the charge being considered equivalent to a trust (*h*). The authorities already mentioned as referring to one case may, therefore, generally be considered as also illustrating the other. There are, however, certain matters particularly relating to such charges which require separate consideration. Prominent among these is the question whether a charge of debts authorised a sale of real estate by executors.

Land charged with debts: same rules apply.

It was laid down by Sir L. Shadwell, V.-C., in *Forbes* v. *Peacock* (*i*), that if a testator charged his real estate with payment of his debts, that, *primâ facie*, gave the executor power to sell the real estate and to give the purchaser a good discharge for the purchase-money. This was sustained to a certain extent in *Shaw* v. *Borrer* (*k*) and in *Ball* v. *Harris* (*l*), but it has been questioned whether

Whether it gives power of sale to executors.

(*e*) *Spalding* v. *Shalmer*, 1 Vern. 303.

(*f*) *Culpepper* v. *Aston*, 2 Ch. Ca. 115; *Bird* v. *Fox*, 11 Ha. 40.

(*g*) 2 Atk. 4.

(*h*) See also *Jenkins* v. *Hiles*, 6 Ves. 654, note; *Page* v. *Adam*, *sup.*; *Shaw* v. *Borrer*, 1 Kee. 559; *Re Dyson and Fowke*, (1896) 2 Ch. 720; 65 L. J. Ch. 791.

(*i*) 12 Sim. 528, 541.

(*k*) *Sup.*

(*l*) 4 My. & Cr. 264.

such a charge conferred a *legal* power to sell, and whether in consequence a defendant in a suit for specific performance ought to be compelled to complete the purchase without a conveyance from the heir-at-law (*m*). The decisions on this point have been somewhat conflicting (*n*). The conclusion to be drawn from them seems to be that where there was a general charge of debts upon real estate the executors had in equity an implied power to sell it, and they alone could give a valid receipt for the purchase-money; but that they did not take by implication a legal power to sell, and could not, therefore, convey the legal estate, it being necessary to complete the purchaser's title that the persons in whom it was vested (if not already in the executors by devise or otherwise) should concur in the conveyance (*o*).

Equitable power not legal.

The rule that a purchaser was not bound when the debts were charged generally, was subject to the obvious exception that if he was a party to a breach of trust he would receive no protection; for instance, where a devisee, having a right to sell, sold to pay his own debt, and the purchaser had notice of these facts (*p*). Where trustees, instead of selling under a power in a will, raised money by mortgage in a manner not authorised by the power, many years after the testator's death, the mortgagee being party to a breach of trust, his security was invalid (*q*); but the mortgagee in such a case was entitled to stand as a creditor in respect of the produce of the estates, to the extent to which the mortgage money was rightly applied (*r*).

Purchaser always liable if party to a breach of trust.

3. *Statutory modifications of the principles.*

It now remains to consider how these principles, which

(*m*) *Gosling* v. *Carter*, 1 Coll. 644.
(*n*) *Doe* d. *Jones* v. *Hughes*, 6 Exch. 223; *Robinson* v. *Lowater*, 17 Beav. 532; *Wrigley* v. *Sykes*, 21 Beav. 337.
(*o*) *Hodkinson* v. *Quinn*, 1 J. & H. 303, 309.
(*p*) *Eland* v. *E.*, 4 My. & Cr. 427.
(*q*) *Stroughill* v. *Anstey*, 1 De G. M. & G. 635.
(*r*) *Devaynes* v. *Robinson*, 24 Beav. 86.

rested on the decisions of the Courts, have been affected by statutory enactments.

(1.) As to purchasers' liability.

As to purchasers' liability.

i. The law is now chiefly regulated by the provisions in this respect of Lord St. Leonards' Act (*s*), which was passed and came into operation on August 13th, 1859. By sect. 23 of this Act it is enacted "that the *bonâ fide* "payment to, and the receipt of, any person to whom any "purchase or mortgage money shall be payable upon any "express or implied trust, shall effectually discharge the "person paying the same from seeing to the application, "or being answerable for the misapplication thereof, "unless the contrary shall be expressly declared by the "instrument creating the trust or security."

22 & 23 Vict. c. 35.

s. 23.

ii. A more extensive power, in that it is not confined to purchase or mortgage money, was given by Lord Cranworth's Act (*t*), which has, however, been since replaced by a still more comprehensive section in the Conveyancing and Law of Property Act, 1881 (*u*), repeated in the Trustee Act, 1893 (*x*).

23 & 24 Vict. c. 145, s. 29.

44 & 45 Vict. c. 41, s. 36.

This statute enacts that "the receipt in writing of "any trustee for any money, securities, or other personal "property or effects payable, transferable, or deliverable "to him under any trust or power, shall be a sufficient "discharge for the same, and shall effectually exonerate "the person paying, transferring, or delivering the same "from seeing to the application, or being answerable for "any loss or misapplication thereof." And this applies to trusts created either before or after the commencement of the Act.

The Settled Land Act, 1882 (*y*), contains a similar retrospective provision.

(2.) As to the power of sale.

As to power of sale.

Lord St. Leonards' Act also contains important pro-

(*s*) 22 & 23 Vict. c. 35.
(*t*) 23 & 24 Vict. c. 145, s. 29.
(*u*) 44 & 45 Vict. c. 41, s. 36.
(*x*) 56 & 57 Vict. c. 53, s. 20.
(*y*) 45 & 46 Vict. c. 38, s. 40.

visions respecting the powers of trustees and executors to sell, in various circumstances.

General effect of the statute.

The general effect of the statute may thus be summed up :—It has removed the difficulty created by the decisions in two cases : 1st, If a testator charges his real estate with debts, and devises all his estate therein to trustees, the *trustees* for the time being, however appointed, can sell or mortgage for the satisfaction of the charge (*z*) ; 2ndly, If after a similar charge the testator does not devise all his estate therein to trustees, the *executor* has power to sell or mortgage (*a*). The power could not be exercised by an administrator (*b*) nor an administrator *cum testamento annexo* (*c*). By the Land Transfer Act, 1897 (*d*), all the real property (other than copyholds) of a testator or intestate dying after December 31st, 1897, vests, upon his death, in his legal personal representatives, who become trustees for the persons beneficially entitled, and have the same powers and duties in regard to it as if it were a chattel real ; and this includes a power of sale. Under the previous law it was held that after a lapse of twenty years where executors sold real estate under a power arising by reason of a charge of debts, the presumption was that the debts were paid, and that therefore the purchaser was bound to make inquiry as to the existence of debts (*e*). But the same rule does not apply to the sale of leaseholds by an executor (*f*). Having regard to the terms of sect. 3 of the Act, it would seem that this distinction is still effective (*g*).

(*z*) Sects. 14, 15.
(*a*) Sect. 16.
(*b*) *Ricketts* v. *Lewis*, 20 Ch. D. 745 ; 51 L. J. Ch. 837.
(*c*) *Re Clay*, 16 Ch. D. 3 ; 50 L. J. Ch. 164.
(*d*) 60 & 61 Vict. c. 65, ss. 1—3.
(*e*) *Re Tanqueray-Willaume*, 20 Ch. D. 465 ; 51 L. J. Ch. 434.
(*f*) *Re Venn and Furze*, (1894) 2 Ch. 101 ; 63 L. J. Ch. 303.
(*g*) See Brickdale & Sheldon's Land Transfer Act, pp. 246, 271.

IV. *Assignment of Possibilities and Choses in Action.*

Possibilities and choses in action not assignable at law.

1. It was an ancient and well established principle of common law that no possibility, right, title, nor thing in action could be granted or assigned to strangers (*h*); and accordingly, if there was what purported to be an assignment of such interests, the assignee could not sue at law for them in his own name.

Exceptions, customary and statutory.

The necessities of commerce, however, long ago effected a modification of this principle, even at law. Some choses in action, of which bills of exchange are a type, became assignable by custom; others have from time to time been expressly made so by statute—for instance, promissory notes, by 3 & 4 Anne, c. 9, 7 Anne, c. 25; railway bonds, by 8 & 9 Vict. c. 19; endorsed bills of lading, by 18 & 19 Vict. c. 111; and, as we have elsewhere observed, policies of life and marine assurance, by 30 & 31 Vict. c. 144, and 31 & 32 Vict. c. 86 (*i*). But in all cases not so provided for, it until recently remained necessary for an assignee suing at law to use the name of the original creditor (*k*).

Assignments recognised in equity.

Courts of equity, on the other hand, have been wont from an early period to recognise the validity of the assignment of possibilities and choses in action generally; and have continually carried such assignments into effect, when made for valuable consideration (*l*).

We are thus led to the consideration of a striking and fundamental contrast of principles between law and equity, which remains of importance, notwithstanding the provisions of the Judicature Act presently quoted.

First, it will be desirable to cite in detail, by way of illustration, some instances of rights which have been deemed assignable in equity, though not so in law.

(*h*) *Lampet's Case*, 10 Co. 47.
(*i*) *Sup.* p. 61.
(*k*) *De Pothonier* v. *De Mattos*, Ell. Bl. & Ell. 467.
(*l*) *Anon.*, Freem. 115; *Squib* v. *Wyn*, 1 P. Wms. 381.

Of these there are two principal classes, the first comprising possibilities; the second, debts of various kinds.

Possibilities.

(1.) In respect of the former, one of the leading authorities is the case of *Warmstrey* v. *Tanfield* (*m*).

Warmstrey v. *Tanfield.*

There, one William Freeman, being possessed of the third part of a parsonage for the whole term to come, granted all his interest therein to one Alborough, in trust for the use of the said Freeman and his wife during their lives, and after to the use of such issue male of their bodies as the said Freeman should by will appoint. Freeman appointed the premises after the death of his wife to his son Richard, who, during the life of his mother, assigned the premises to the plaintiff. The defendant claimed under a lease made by the said Richard Freeman two years after the said assignment.

It was held that though the assignment was of a mere possibility (being dependent on Richard's surviving his mother), and therefore not good in law, yet it was valid in equity, and the plaintiff's claim was allowed, as arising under a deed precedent to that through which the defendant claimed.

Expectancies.

(2.) On grounds analogous to this we find equity enforcing assignments of mere expectancies, such as that of an heir-at-law (*n*), or the next of kin of a living person (*o*), or the interest which a person expects under the will of a living person (*p*), or the share to which a person may become entitled under an appointment (*q*).

Non-existent and future property.

(3.) By a somewhat further extension of the same principle, non-existent property, or property to be acquired at a future time, has been held assignable in equity; such as the future cargo of a ship (*r*), future patent rights (*s*),

(*m*) 1 Ch. Rep. 29; 2 W. & T. L. C. 724.
(*n*) *Hobson* v. *Trevor*, 2 P. Wms. 191.
(*o*) *Hinde* v. *Blake*, 3 Beav. 235.
(*p*) *Beckley* v. *Newland*, 2 P. Wms. 182.
(*q*) *Musprat* v. *Gordon*, 1 Anst. 34.
(*r*) *Lindsay* v. *Gibbs*, 22 Beav. 522.
(*s*) *Printing, &c. Co.* v. *Sampson*, 19 Eq. 462.

machinery yet to be erected (*t*), future stock in trade to be brought on the mortgaged premises (*u*), and the future book debts of a business (*x*). But such assignments of future interests are liable to be postponed to a purchaser who secures the legal title (*u*), and are subject to the right of the assignee's trustee in bankruptcy in case of his bankruptcy occurring before the expectancy falls into possession (*y*).

(4.) The jurisdiction of the Courts of law was extended by 8 & 9 Vict. c. 106, by s. 6 of which it was enacted that thereafter contingent, executory and future interests and possibilities, *coupled with an interest in real estate*, might be assigned at law by deed. But this Act left untouched assignments of contingent interests in chattels, and mere naked possibilities not coupled with an interest. As to such, therefore, equity alone continued to recognise the validity of assignments.

8 & 9 Vict. c. 106, s. 6.

(5.) One of the principal early authorities on the assignment of debts is *Row* v. *Dawson* (*z*).

Choses in action.

In this case Tonson and Conway lent money to Gibson, who gave them a draft in the following terms: "Out of "the money due to me from Horace Walpole out of the "Exchequer, and what will be due at Michaelmas, pay to "Tonson and Conway; value received." Gibson having become bankrupt, the question was whether this draft created a specific lien upon the sum due to his estate.

Row v. *Dawson.*

Lord Hardwicke distinguished between this draft and a bill of exchange, the draft being not to pay generally, but out of a particular fund, and creating no personal demand; and he held that there being an agreement for valuable

(*t*) *Holroyd* v. *Marshall*, 10 H. L. 191.

(*u*) *Joseph* v. *Lyons*, 15 Q. B. D. 280; 54 L. J. Q. B. 1; *Hallas* v. *Robinson*, 15 Q. B. D. 288; 54 L. J. Q. B. 364.

(*x*) *Tailby* v. *Official Receiver*, 13 App. Cas. 523; 58 L. J. Q. B. 75,

(*y*) *Collyer* v. *Isaacs*, 19 Ch. D. 342; 51 L. J. Ch. 14; *Exp. Nichols*, 22 Ch. D. 782; 52 L. J. Ch. 635; *Wilmot* v. *Alton*, (1897) 1 Q. B. 17; 66 L. J. Q. B. 42; *Coombe* v. *Carter*, 35 Ch. D. 109; 36 *ib.* 348; 56 L. J. Ch. 981.

(*z*) 1 Ves. sr. 331; 2 W. & T. L. C. 726.

consideration beforehand to lend money on the faith of being satisfied out of the fund, the draft was a credit on the fund, and amounted to an assignment of so much of the debt; and that though the law did not admit an assignment of a chose in action, equity did, and that any words would do, no particular form being necessary thereto.

The first question which arises in cases of this nature is as to what does and what does not amount to a valid equitable assignment.

No particular form required.

The above case establishes the principle that any words which show an intention to appropriate the chose in action to the assignee, are, if supported by valuable consideration, sufficient to effect a valid assignment. In other words, an agreement between a debtor and a creditor that the debt owing shall be paid out of *a specific fund* coming to the debtor (*a*), or an order given by a debtor to his creditor upon a third person, who has funds of the debtor, to pay the creditor out of such funds (*b*), will effect a complete assignment in equity of so much money (*c*). Writing is not necessary, if there is clear proof of an oral charge (*d*).

Intention must be clear.

The intention to create a charge must, however, be clear. A promise to pay when the debtor receives a debt due to him from a third person is not sufficient (*e*), nor is a statement that the arrival of a certain cargo would put him in funds (*f*); nor is a cheque or bill of exchange an equitable assignment of the drawer's balance at his bank (*g*).

Assignment

Again, an equitable assignment is not complete until it

(*a*) *Percival* v. *Dunn*, 29 Ch. D. 128; 54 L. J. Ch. 570; *Rodick* v. *Gandell*, 1 De G. M. & G. 763, 776.

(*b*) *Burn* v. *Carvalho*, 4 My. & Cr. 702; *Re Toward*, 14 Q. B. D. 310; 54 L. J. Q. B. 126.

(*c*) *Diplock* v. *Hammond*, 2 Sm. & G. 141; 5 De G. M. & G. 320; *Lett* v. *Morris*, 4 Sim. 607.

(*d*) *Gurnell* v. *Gardner*, 7 Jur. N. S. 1220; *Parish* v. *Poole*, 53 L. T. R. 35.

(*e*) *Field* v. *Megaw*, L. R. 4 C. P. 660.

(*f*) *Jones* v. *Starkey*, 16 Jur. 510.

(*g*) *Hopkinson* v. *Forster*, 19 Eq. 74; *Shand* v. *Du Buisson*, 18 Eq. 283. See *Hadley* v. *H.*, (1898) 2 Ch. 680; 67 L. J. Ch. 694.

is communicated to the creditor. Thus a mere mandate from a principal to his agent to pay a debt out of a certain fund gives the creditor no specific charge on that fund (*h*). Until such mandate is communicated to the creditor, and assented to by him, it may be revoked (*i*), and the bankruptcy of the debtor operates as such revocation (*k*). But after such communication the agent becomes the debtor of the assignee, and the order cannot then be countermanded (*l*).

complete only on communication to creditor.

On the other hand, a mere power of attorney, or authority to a person to receive money, not addressed to the debtor, does not amount to an equitable assignment (*m*).

Must be addressed to debtor.

2. *Notice, how far required.*

(1.) An equitable assignment is complete *as between assignor and assignee*, though no notice thereof is given to the depositary or holder of the fund (*n*); nor is notice necessary as against a person standing in the same position as the assignor, such as a judgment creditor (*o*), or a creditor under a garnishee order (*p*). Such a creditor will therefore be postponed to an equitable assignee, notwithstanding that he may have, after the assignment, but before notice to the depositary, obtained an order charging the fund (*q*).

Notice not needed as between assignor and assignee.

(2.) But to complete the security of the assignee, it is for many purposes necessary for him promptly to give notice of the assignment to the holder of the fund.

But is required to complete security;

First, in the absence of such notice the holder of the fund may effectually discharge himself by paying the assignor,

otherwise debtor may safely pay assignor,

(*h*) *Morell* v. *Wooten*, 16 Beav. 197.

(*i*) *Scott* v. *Porcher*, 3 Mer. 652; *Brown Shipley* v. *Kough*, 29 Ch. D. 848; 54 L. J. Ch. 1024.

(*k*) *Exp. Hall*, 10 Ch. D. 15.

(*l*) *Fitzgerald* v. *Stewart*, 2 R. & M. 457.

(*m*) *Rodick* v. *Gandell*, *sup.*; *Bell* v. *L. & N. W. R.*, 15 Beav. 548.

(*n*) *Jones* v. *Gibbons*, 9 Ves. 410; *Cook* v. *Black*, 1 Ha. 390.

(*o*) *Beavan* v. *Ld. Oxford*, 6 De G. M. & G. 492.

(*p*) *Pickering* v. *I. R. Co.*, L. R. 3 C. P. 235.

(*q*) *Scott* v. *Ld. Hastings*, 4 K. & J. 633.

and if he does so the charge of the assignee will, of course, be lost (*r*).

or subsequent incumbrancer may gain priority. *Dearle* v. *Hall.*

Secondly, if the assignor make a subsequent assignment of the debt, and the second assignee gives notice before the first does so, the second thereby gains priority (*s*), whether the interest of the assignor be present or future, vested or contingent. The principle is the same as that which requires the assignee of a personal chattel to take every step in his power to reduce it into possession, and in case of his neglect postpones him to a subsequent assignee for value, who takes without notice. Of the two parties one must suffer; and equity will not assist the one prior in time if by his negligence the possessor has been enabled to deceive the second assignee. If, however, the former has done all he could to secure possession, he will not lose his priority (*t*), and if the debtor or person claiming through him should pay the debt in spite of the notice to any other than the assignee, he is liable to pay it again out of his own funds (*u*). If the notices of the assignments are simultaneous they will take priority according to their dates (*x*). The doctrine, however, does not apply to shares in registered companies, equitable charges on which have priority in order of date, unaffected by notice (*y*).

Reputed ownership in bankruptcy.

Again, notice is often requisite to protect an assignee against the effect of the reputed ownership clause of the Bankruptcy Act. Under the present Act (*z*) all goods and chattels being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his trade or business, by the consent and permis-

(*r*) *Norrish* v. *Marshall*, 5 Madd. 475.

(*s*) *Dearle* v. *Hall*, *Loveridge* v. *Cooper*, 3 Russ. 1, 30, 48; *Brice* v. *Bannister*, 3 Q. B. D. 569; *Stephens* v. *Green*, (1895) 2 Ch. 148; 64 L. J. Ch. 546.

(*t*) *Feltham* v. *Clark*, 1 De G. & Sm. 307; *Re Seaman*, (1896) 1 Q. B. 412; 65 L. J. Q. B. 348.

(*u*) *Brice* v. *Bannister*, *sup.*; *Ward* v. *Duncombe*, (1893) A. C. 369; 62 L. J. Ch. 881.

(*x*) *Calisher* v. *Forbes*, 7 Ch. 109; *Johnstone* v. *Cox*, 16 Ch. D. 571; 50 L. J. Ch. 216; *Marchant* v. *Morton*, (1901) 2 K. B. 829; 70 L. J. K. B. 820.

(*y*) *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20; 55 L. J. Q. B. 169.

(*z*) 46 & 47 Vict. c. 52, s. 44.

sion of the true owner, under such circumstances that he is the reputed owner thereof, are treated as the property of the bankrupt divisible among his creditors; provided that things in action, other than debts due or growing due to the bankrupt in the course of his business, shall not be deemed goods within the meaning of the Act.

An assignee of chattels is only protected against this clause by taking every step he can to secure possession. Under the former Acts, choses in action were within the clause as comprehended under "goods and chattels," and in order to divest from the mortgagor the ownership of outstanding choses in action, notice to the debtor was necessary (*a*). The same principle still applies to outstanding *debts* due to the bankrupt in the course of his business. Shares in an incorporated company are choses in action, and accordingly not within the clause (*b*).

It has been held that it is sufficient protection for the assignee if he gives notice between the act of bankruptcy and the petition for adjudication, *bonâ fide* dealings with the bankrupt during that time being especially protected (*c*).

Equitable interests in land distinguished.

The distinction must be observed between such cases as these, in which priority is determined by the time of notice, and the case of equitable interests in land, priority as to which is fixed by the order in time of the incumbrances, and is not affected by notice (*d*).

Charging order.

For the reasons above given an assignee of a debt should always promptly give written notice of the assignment to the debtor, since by this means alone can he secure a right *in rem* to the debt. The assignee can completely protect his security by obtaining a charging order upon the funds,

(*a*) *Ryall* v. *Rowles*, 1 Ves. sr. 348; 2 W. & T. L. C. 729; *Rutter* v. *Everett*, (1895) 1 Ch. 872; 64 L. J. Ch. 845; *Re Mills' Trusts*, (1895) 1 Ch. 564; 64 L. J. Ch. 708.

(*b*) *Colonial Bank* v. *Whinney*, 11 App. Cas. 426; 56 L. J. Ch. 43.

(*c*) Sect. 49. *Re Styan*, 1 Ph. 105; 2 M. D. & De G. 219.

(*d*) *Jones* v. *J.*, 8 Sim. 633; *Wiltshire* v. *Rabbits*, 14 Sim. 76; *Taylor* v. *London and County Bank*, (1901) 2 Ch. 231; 70 L. J. Ch. 477.

Transfer into Court; stop order.

or a transfer of them into Court (*e*). If the fund is already in Court the assignee should at once obtain a stop order, or he is liable to be postponed to a subsequent assignee who takes this step before him (*f*). This has just the same effect as notice to a trustee while the fund is in his hands, and if the fund is paid in after such notice, it is secure, even without a stop order (*g*).

Assignee takes subject to equities;

3. The assignee of a chose in action, whether it be a debt or a trust fund, generally takes it subject to all equities which affect it as against the assignor. Thus, a bond void as against the assignor does not become valid in the hands of an assignee (*h*); if the assigned debt is subject to a set-off by the debtor, the assignee is liable to the set-off (*i*); if the debt is payment only on condition, the condition is binding on the assignee (*k*); and generally, the assignee takes subject to the state of accounts between the assignor and the debtor (*l*). Similarly, an assignee of a legacy or residue, though for value and without notice, takes subject to the testator's debts (*m*).

except in case of negotiable instruments,

There are, however, two classes of exceptions to this rule. First, as to negotiable instruments, such as bills of exchange, which, on grounds of commercial convenience or necessity, carry with them a title free from any equities or cross-claims as between the parties thereto (*n*). On similar grounds, indorsed bills of lading (*o*) and debentures and railway bonds payable to bearer (*p*) have been similarly

(*e*) See O. XLVI.

(*f*) *Ibid.*; *Greening* v. *Beckford*, 5 Sim. 195; *Mutual Life, &c. Co.* v. *Langley*, 32 Ch. D. 460; *Swayne* v. *S.*, 11 Beav. 463; *Mack* v. *Postle*, (1894) 2 Ch. 449; 63 L. J. Ch. 593.

(*g*) *Livesey* v. *Harding*, 23 Beav. 141; *Thompson* v. *Tomkins*, 2 Dr. & Sm. 8; *Re Holmes*, 29 Ch. D. 786.

(*h*) *Turton* v. *Benson*, 1 P. Wms. 496.

(*i*) *Exp. Mackenzie*, 7 Eq. 240; *Cavendish* v. *Greaves*, 24 Beav. 163, 173; *Dœring* v. *D.*, 42 Ch. D. 128; 58 L. J. Ch. 553.

(*k*) *Tooth* v. *Hallett*, 4 Ch. 242.

(*l*) *Ord* v. *White*, 3 Beav. 357; *Rolt* v. *White*, 31 *ib.* 520.

(*m*) *Hooper* v. *Smart*, 1 Ch. D. 90.

(*n*) *Exp. City Bank*, 3 Ch. 758; *Bence* v. *Sherman*, (1898) 2 Ch. 582; 67 L. J. Ch. 513.

(*o*) *Chartered Bank, &c.* v. *Henderson*, L. R. 5 P. C. 501.

(*p*) *In re Blakely Ordnance Co.*, 3

treated. Bills of exchange indorsed when overdue are not, however, within the exception (*q*).

Secondly, equities affecting the chose in action may be lost by the release, either express or implied, of the person entitled thereto (*r*); or by his neglect to enforce them against the assignee. Enjoyment undisturbed for a considerable lapse of time always tends to strengthen the position of the assignee (*s*). or of *laches*.

4. The law as to the assignment of choses in action has been placed on a different footing by the Judicature Act, 1873. It is thereby enacted (*t*) that "Any absolute "assignment by writing under the hand of the assignor "(not purporting to be by way of charge only) of any "debt or other legal chose in action, of which express "notice in writing shall have been given to the debtor, "trustee, or other person from whom the assignor would "have been entitled to receive or claim such debt or chose "in action, shall be, and shall be deemed to have been, "effectual in law (subject to all equities which would have "been entitled to priority over the right of the assignee if "the Act had not passed) to pass and transfer the legal "right to such debt or chose in action from the date of "such notice, and all legal and other remedies for the "same, and a power to give a good discharge for the same "without the concurrence of the assignor." Jud. Act, s. 25, sub-s. 6.

It is only necessary with respect to this to observe that— Effect of.

(1.) It applies only to absolute assignments, which must be of a definite and ascertained amount (*u*). The assignee of a debt by way of charge cannot sue at law (*x*). But a

Ch. 154; *Venables* v. *Baring Bros.*, (1892) 3 Ch. 527; 61 L. J. Ch. 609.

(*q*) *Holmes* v. *Kidd*, 3 H. & N. 891.

(*r*) *In re Northern Assam Tea Co.*, 10 Eq. 458; *In re Agra, &c. Bank*, 2 Ch. 391.

(*s*) *Hill* v. *Caillovel*, 1 Ves. sr. 122; *Exp. Chorley*, 11 Eq. 157.

(*t*) 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

(*u*) *Jones* v. *Humphreys*, (1902) 1 K. B. 10.

(*x*) *National Prov. Bank* v. *Harle*,

mortgage of debts made in the ordinary form, with a proviso for redemption upon repayment to the mortgagor, has been held to be an absolute assignment within the Act (*y*).

(2.) It applies only to legal choses in action. Equitable choses in action, whether absolute or by way of charge, are unaffected by this section, and if assigned can be sued for in all Courts, the assignor and assignee being before the Court.

(3.) Express notice in writing of the assignment must have been given by the assignor. Previous, however, to this Act an oral assignment of a legal chose in action was valid in equity, and will now be regarded valid in all Courts, the mode of transfer under the Act not being compulsory.

Illegal assignments.

5. This is a convenient place in which to comment on certain assignments similar to those just now considered, but which are on grounds of public policy deemed void both at law and in equity.

Pensions, &c.

(1.) Pensions and salaries payable to public officers are considered as given for maintaining the dignity of their offices, and for securing the proper discharge of the duties thereof. Effect will not, therefore, be given to an attempted assignment of such pensions or salaries. Within this principle fall the pay of a military officer (*a*), of a clerk of the peace (*b*), of a judge (*c*), and in fact the emoluments of any public office (*d*). Alimony is likewise not assignable (*e*).

6 Q. B. D. 626; *Durham* v. *Robertson*, (1898) 1 Q. B. 765; 67 L. J. Q. B. 484; *Mercantile Bank* v. *Evans*, (1899) 2 Q. B. 613; 68 L. J. Q. B. 921.

(*y*) *Tancred* v. *Delagoa Bay R.*, 23 Q. B. D. 239; 58 L. J. Q. B. 459; *Durham* v. *Robertson, sup.*; *Comfort* v. *Betts*, (1891) 1 Q. B. 737; 60 L. J. Q. B. 656; and see *Hughes* v. *Pump, &c. Co.*, (1902) 2 K. B. 190.

(*a*) *Stone* v. *Lidderdale*, 2 Anstr. 533; *Crowe* v. *Price*, 22 Q. B. D. 429; 58 L. J. Q. B. 215; *Apthorpe* v. *A.*, 12 P. D. 192.

(*b*) *Palmer* v. *Bate*, 6 Moo. 28; 2 Br. & B. 673.

(*c*) *Arbuthnot* v. *Norton*, 5 Moo. P. C. 219.

(*d*) See 46 Geo. III. c. 69, s. 7; 47 Geo. III. sess. 2, c. 25, s. 4; *Davis* v. *D. of Marlborough*, 1 Swanst. 74.

(*e*) *Re Robinson*, 27 Ch. D. 160; 53 L. J. Ch. 986; *Watkins* v. *W.*, (1896) P. 222; 65 L. J. P. 75.

What pensions are assignable.

Where, however, no particular service is to be rendered to the public, an assignment of an interest or pension is valid. Thus prize money was held assignable (*f*); so also the pension of a County Court Judge for past services (*g*), and civil service pensions generally (*h*).

Champerty and maintenance.

(2.) Public policy, again, is opposed to assignments which partake of the nature of champerty, or maintenance (*i*), or the buying of disputed or pretended titles.

Thus an assignment of a share of prize money, *the subject of a then depending suit* in the Admiralty Court, in consideration of the assignee paying the costs of the suit, was held void (*k*); the assignment of a bare right to file a bill in equity was similarly treated (*l*).

Purchase *pendente lite*, when admissible.

But in certain cases a purchase or mortgage of an interest *pendente lite*, or an advance of money for carrying on a suit, is admissible. It is so if the parties have a common interest (*m*), or if there exists between them the relation of father and son (*n*), ancestor and heir (*o*), or master and servant (*p*). The purchase *pendente lite* of the subject-matter of a suit by an attorney is, however, always invalid (*q*), unless at least it be by way of security for payment of his costs (*r*); and the law in this respect is unaffected by 33 & 34 Vict. c. 28, which enabled attorneys and solicitors in certain cases to make agreements with their clients as to remuneration in lieu of costs (*s*). A sale

(*f*) *Alexander* v. *D. of Wellington*, 2 R. & M. 35.

(*g*) *Willcock* v. *Terrell*, 3 Ex. D. 323; *Re Ward*, (1897) 1 Q. B. 266; 66 L. J. Q. B. 310.

(*h*) *Sanson* v. *S.*, 4 P. D. 69.

(*i*) *Bradlaugh* v. *Newdegate*, 11 Q. B. D. 1; *James* v. *Kerr*, 40 Ch. D. 449; 58 L. J. Ch. 355; *Rees* v. *De Bernardy*, (1896) 2 Ch. 437; 65 L. J. Ch. 656; but see and distinguish *Guy* v. *Churchill*, 40 Ch. D. 481; 58 L. J. Ch. 345.

(*k*) *Stevens* v. *Bagwell*, 15 Ves. 139.

(*l*) *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481; *Powell* v. *Knowles*, 2 Atk. 226; *Hill* v. *Boyle*, 4 Eq. 260, 263; *In re Paris Skating Rink Co.*, 5 Ch. D. 959.

(*m*) *Hunter* v. *Daniel*, 4 Ha. 420; *Guy* v. *Churchill*, *sup.*

(*n*) *Burke* v. *Greene*, 2 Ba. & B. 521.

(*o*) *Moore* v. *Fisher*, 7 Sim. 384.

(*p*) *Wallis* v. *D. of Portland*, 3 Ves. 503.

(*q*) *Simpson* v. *Lamb*, 7 E. & B. 84.

(*r*) *Anderson* v. *Radcliffe*, 6 Jur. N. S. 578.

(*s*) *In re Att. & Sol. Act*, 1870, 1 Ch. D. 573.

which was completed before the purchaser became the vendor's attorney has been sustained (*t*).

The strict rule as to champerty seems to have been sometimes relaxed in special circumstances; for instance, the assignment of a legacy by a person too poor to sue for it, to another, who sought to enforce payment by suit, was upheld (*u*). And it is to be observed that a person who has originally a good title to sue will not lose it by entering into a bargain tainted with champerty (*x*).

(*t*) *Davis* v. *Freethy*, 24 Q. B. D. 519; 59 L. J. Q. B. 318.

(*u*) *Tyson* v. *Jackson*, 30 Beav. 384; *Harris* v. *Brisco*, 17 Q. B. D. 504; 55 L. J. Q. B. 423.

(*x*) *Hilton* v. *Woods*, 4 Eq. 432.

CHAPTER VI.

SURETYSHIP.

I. *Contrast between Legal and Equitable Doctrines.*

THE distinctions which formerly existed between the principles of common law and those of equity respecting suretyship, may be concisely summarised under the following headings:—

Proof of suretyship when not apparent on the face of the instrument.

1. Where it did not appear on the face of the instrument creating the suretyship that a person was surety—if, for instance, in a bond the principal debtor and surety were bound jointly and severally—the surety could not, *at law*, aver by pleading that he was bound only as a surety, nor was parol evidence admissible to prove it (*a*). But in

(*a*) *Lewis* v. *Jones*, 4 B. & C. 506.

equity, although they both appeared as principals, parol evidence was always admissible to show that one was only a surety (*b*). The consequence was that upon the creditor giving further time to the principal debtor, knowing him to be such, the surety, upon proving that fact, might have relief in equity, although at law, where he appeared only as principal, he would formerly have been held bound (*c*). When equitable pleas became available at common law this distinction disappeared (*d*).

Release of sureties under deeds.

2. In general an obligation created by an instrument could at law only be dissolved by one of equal force. Thus, time given by a mere parol agreement, although for valuable consideration, would not at law have discharged a surety whose obligation arose from an instrument under seal (*e*), or by matter of record, such as a recognisance (*f*). In equity, however, this rule of law was disregarded; and as "*what is agreed to be done is looked upon as done*," relief is in such cases given (*g*). Conversely, by the operation of the same rule, a principal creditor might have been held at law to have released a surety, where in equity the surety would still be considered liable—for instance, where the creditor had by deed, with the parol consent only of the surety, released the principal debtor (*h*).

Conversely, surety continuing liable after release.

Principles of contribution at law.

3. The general principle of contribution between sureties at law originally rested on the ground only of an express contract between the parties. Subsequently jurisdiction was assumed to compel contribution in the absence of positive contract, on the ground of implied *assumpsit*. But though this assumption approached the equitable principle of dealing with such cases, since it was held that

(*b*) *Clarke* v. *Henty*, 3 Y. & C. Ex. 187.

(*c*) *Craythorne* v. *Swinburne*, 14 Ves. 160, 170.

(*d*) *Pooley* v. *Harradine*, 7 E. & B. 431.

(*e*) *Davey* v. *Prendergrass*, 5 B. & Ald. 187.

(*f*) *Bulteel* v. *Jarrold*, 8 Price, 467.

(*g*) *Bowmaker* v. *Moore*, 3 Price, 214.

(*h*) *Brooks* v. *Stuart*, 1 Beav. 512.

separate actions might be brought against the sureties for their respective quotas and proportions, there was great inconvenience in working out the legal remedy where the sureties were numerous. Hence the equitable relief by bill for contribution remained the best mode which could be resorted to.

Insolvency of one or more sureties;

4. Where there were several sureties, and one became insolvent, a surety who paid the entire debt could at law have recovered only an aliquot part of the whole, calculated according to the original number of the co-sureties (*i*). In equity he can compel the remaining sureties to contribute equally with himself (*k*). Thus if there were three sureties, one of whom became insolvent, and one of the remaining two paid the entire debt, at law he could only recover one-third from the remaining solvent surety; in equity he can recover one-half.

or death.

So, also, if one of several co-sureties died, at law an action only lay against the surviving sureties for their proportions; but in equity contribution can be enforced also against the representatives of the deceased surety (*l*).

It was owing to the imperfection of the legal remedy in these and other respects, which will be hereafter noticed, that the jurisdiction of equity in matters of suretyship arose; and being once established, it was not affected by the subsequently extended jurisdiction of the Courts of law. Cases of suretyship, therefore, continue to come chiefly under the cognizance of the Chancery Division of the High Court.

(*i*) *Cowell* v. *Edwards*, 2 B. & P. 268. See *Lowe* v. *Dixon*, 16 Q. B. D. 455.

(*k*) *Hitchman* v. *Stewart*, 3 Drew. 271.

(*l*) *Simpson* v. *Vaughan*, 2 Atk. 31; *Batard* v. *Hawes*, 2 E. & B. 287.

II. *The General Principles of Equity respecting Suretyship.*

1. *As to the original formation of the contract.*

Utmost good faith required.

The intimate nature of the relation between the parties to the contract of suretyship requires that the utmost good faith should be adhered to by them; and though it has been held that the obligation to disclose all material facts, is not in this case so strict as in contracts between solicitor and client, and in contracts of partnership and of insurance, nevertheless, very little said which ought not to have been said, and very little omitted which ought to have been said, will suffice to avoid the contract (*m*). Whenever there is, with the knowledge and assent of the creditor, any undue advantage taken of the surety, as by concealment or surprise, the contract will be considered invalid, and the surety discharged from liability.

What concealment annuls the obligation.

It is impossible to lay down in general terms any rule by which to determine what degree of concealment or misrepresentation is necessary to annul the obligation of the contract. Equity has always been reluctant to formulate definitions on such subjects, lest, having done so, its jurisdiction should be eluded by new schemes of man's ingenuity. Some guidance is, however, afforded by the well authorised statement that "if a party taking a guarantee from a surety conceals from him facts which go to increase his risks, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to fraud" (*n*). But this broad statement is, in fact, subject to certain limitations, since it has been held that the true criterion as to whether any disclosure ought to be made voluntarily, is to inquire whether there was anything which might not naturally have been expected to have taken place between the parties; that is,

(*m*) *Davies* v. *London and Prov. Marine Insce. Co.*, 8 Ch. D. 469; *N. B. Insce. Co.* v. *Lloyd*, 10 Exch. 523; *Seaton* v. *Burnand*, (1900) A. C. 135; 68 L. J. Q. B. 631.

(*n*) Story's Eq. Jur. s. 215.

whether there was a contract between the debtor and creditor to the effect that his position should be different from that which the surety might naturally expect (*o*).

A surety is entitled to be informed of any private bargain between a vendor and vendee, being a part of the immediate transaction, which can in any way increase his responsibility (*p*); and, moreover, if there are any circumstances which afford ground for suspecting that fraud is being practised upon the surety by the debtor, the creditor cannot shelter himself under the plea that he was not called upon to ask, and did not ask, any questions on the subject. In such cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge (*q*).

Private bargains increasing the responsibility.

Fraud.

The rights of a creditor against a surety are regulated by the terms of the contract. The nature, extent, and duration of the obligation depend upon the construction of the agreement, which the Court will not reform on mere presumption of mistake (*r*).

2. *Effects of subsequent departure from the terms of the contract.*

(1.) Giving time to the debtor.

The case of *Rees* v. *Berrington* (*s*) is a leading authority for the general proposition that if a creditor, without the assent or knowledge of the surety, agrees to give to the principal debtor a longer time than was specified in the contract to which the surety was party, he thereby loses his claim against the surety (*t*). The cases, however, show that in the application of this principle many circumstances must be considered.

General rule as to giving time.

Rees v. *Berrington.*

(*o*) *Hamilton* v. *Watson*, 12 Cl. & F. 109; *Wythes* v. *Labouchere*, 3 De G. & J. 593.

(*p*) *Pidcock* v. *Bishop*, 3 B. & C. 605.

(*q*) *Owen* v. *Homan*, 4 H. L. 997; *Maitland* v. *Irving*, 15 Sim. 437.

(*r*) *Rawstone* v. *Parr*, 3 Russ. 424, 539; *Lloyds* v. *Harper*, 16 Ch. D. 290; *Re Sass*, (1896) 2 Q. B. 12; 65 L. J. Q. B. 481.

(*s*) 2 Ves. jr. 540; 2 W. & T. L. C. 992.

(*t*) See also *Nisbet* v. *Smith*, 2 Bro. C. C. 579.

Mere passiveness not sufficient,

A merely passive attitude on the part of the creditor—for instance, his not taking proceedings against the debtor—will not, in the absence of a binding stipulation in the contract of suretyship requiring activity and promptness on his part, release the surety. He himself must use diligence (*u*). If there be a stipulation that on default the creditor is to sue without delay, then failure to do so will discharge the surety (*x*). In *Rees* v. *Berrington* the creditor was not merely passive, but, without the surety's consent, entered into a binding contract to give further time. In such a case it is immaterial that the delay is given in consequence of the debtor's inability to pay, or that no injury could thereby accrue to the surety. The surety is not required to prove damage. If there is a default he is entitled to be consulted as to what steps shall be taken (*y*). Where a surety for a mortgage debt charged property of his own as collateral security, and the mortgagee without the surety's knowledge gave time to the debtor, both the personal liability and the property of the surety were held to be discharged (*z*). The contract of suretyship may of course be so expressed as to exclude the operation of the principle (*a*).

unless there is an express stipulation to that effect.

Surety need not prove damage.

Time given with surety's consent.

A surety will not be discharged if time is given to the principal debtor with his consent or subsequent approval (*b*); and a subsequent promise to pay the debt will revive a liability which might otherwise have been discharged (*c*).

The agreement to give time must bind the creditor.

An agreement with the debtor to give him further time will not discharge the surety unless it is binding upon the creditor. A mere voluntary promise, not acted upon, and

(*u*) *Eyre* v. *Everett*, 2 Russ. 381.

(*x*) *B. of Ireland* v. *Beresford*, 6 Dow, 233.

(*y*) *Samuel* v. *Howarth*, 3 Mer. 272; *Latham* v. *Chartered Bank of India*, 17 Eq. 205.

(*z*) *Bolton* v. *Buckenham*, (1891) 1 Q. B. 278; 60 L. J. Q. B. 261; *Bolton* v. *Salmon*, (1891) 2 Ch. 48; 60 L. J. Ch. 239.

(*a*) *Greenwood* v. *Francis*, (1899) 1 Q. B. 312; 68 L. J. Q. B. 228.

(*b*) *Tyson* v. *Cox*, T. & R. 395; *Duffy* v. *Orr*, 5 Bli. N. S. 620; *Rouse* v. *Bradford Bank*, (1894) A. C. 586; 63 L. J. Ch. 890.

(*c*) *Mayhew* v. *Crickett*, 2 Swanst. 185, 192.

which cannot be enforced, will not have that effect (*d*); nor will an agreement with a third person, *e.g.*, a co-surety (*e*). Nor will an agreement which is conditional upon the performance of an act which in the event the debtor does not perform (*f*).

Surety's rights must be affected.

A surety will not be discharged by the creditor giving time, if the remedies of the surety are not diminished or affected, *à fortiori* if they are accelerated (*g*).

Surety not released by dealings after judgment;

It seems that when a creditor has obtained a judgment against the surety, no subsequent dealings giving time to the debtor will have the effect of releasing the surety. His liability in fact no longer rests on his suretyship, but on the judgment (*h*), and he is in the position of a principal debtor.

nor if the rights against the surety are reserved.

Nor will the surety be discharged if the creditor, on giving further time to the principal debtor, reserves his right to proceed against the surety; and it is immaterial whether the surety is informed of the arrangement or not. The reason is, that when the right is reserved, the principal debtor cannot say that it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for he was a party to the arrangement by which that right was reserved to the creditor (*i*). It is evident that in such a case, notwithstanding the time given to the principal debtor by the creditor, if the creditor at once proceeds against the surety, the surety may forthwith proceed in his turn against the debtor, and so the benefit of the extended time may not in effect be realised by him; but of this he cannot complain. The right of

(*d*) *Philpot* v. *Briant*, 4 Bing. 717; *Tucker* v. *Laing*, 2 K. & J. 745.

(*e*) *Clarke* v. *Birley*, 41 Ch. D. 422; 58 L. J. Ch. 616.

(*f*) *Badnal* v. *Samuell*, 3 Price, 521.

(*g*) *Hulme* v. *Coles*, 2 Sim. 12; *Petty* v. *Cooke*, L. R. 6 Q. B. 790.

(*h*) *Jenkins* v. *Robertson*, 2 Drew. 351; *Reade* v. *Lowndes*, 23 Beav. 361.

(*i*) *Webb* v. *Hewitt*, 3 K. & J. 442; *Boultbee* v. *Stubbs*, 18 Ves. 20.

the surety against the principal debtor can only be lost by the surety's contract to abandon it (*k*).

Though a surety cannot compel the creditor to proceed against the debtor, if he apprehends loss from the delay of the creditor to sue the principal debtor, he may sue in equity *quia timet* to compel the debtor to discharge the debt (*l*). This has been questioned (*m*), but the principle seems well established by more recent cases (*n*). Of course, the surety may himself discharge the debt, and forthwith proceed against the debtor for recovery of the money.

Divisible contract.

Where a contract is divisible—as, for instance, where successive payments are to be made at fixed periods—if the creditor contracts to give time as to one of such payments, he will release the surety as to that payment only, not as to subsequent payments (*o*).

Giving time to the surety.

(2.) Under this heading may be conveniently mentioned the analogous case in which the holder of a security agrees with *the principal debtor* to give time to the *surety*. It has been held that to do so effects the discharge of the surety (*p*). It was considered that this was a stronger case than an agreement to give time to the principal, which only implies an agreement not to sue the surety; but an express agreement not to sue the surety prevents the creditor from doing that which would throw the surety upon the principal. But if the creditor by separate contract with the surety himself gives him time, the surety is not thereby discharged (*q*).

(*k*) *Close* v. *C.*, 4 De G. M. & G. 176.

(*l*) *Ranelaugh* v. *Hayes*, 1 Vern. 189; *Wright* v. *Simpson*, 6 Ves. 734; *Wooldridge* v. *Norris*, 6 Eq. 410, *inf.* p. 810.

(*m*) See *Lloyd* v. *Dimmack*, 7 Ch. D. 398; *Hughes-Hallett* v. *Indian, &c. Co.*, 22 *ib.* 561; 52 L. J. Ch. 418.

(*n*) *Re Snowdon*, 17 Ch. D. 44; 50 L. J. Ch. 540; *Wolmershausen* v. *Gullick*, (1893) 2 Ch. 514; 62 L. J. Ch. 773; De Colyar on Guarantees, p. 300.

(*o*) *Croudon Gas Co.* v. *Dickinson*, 2 C. P. D. 46.

(*p*) *Oriental, &c. Corp.* v. *Overend, Gurney & Co.*, 7 Ch. 142, per Lord Hatherley, p. 152; see *S. C.*, L. R. 7 H. L. 349.

(*q*) *Defries* v. *Smith*, 10 W. R. 189.

(3.) Other variations in the contract.

Where there is in the contract between the principal debtor and the creditor a departure from that which the surety stipulated for and contemplated when he entered into the obligation, the surety will, as a general rule, be released (*r*). Departures from the contract generally release sureties.

Thus where a person had agreed to become surety for another in a joint and several bond to A. and B. upon having a counter-bond from A. and C. to indemnify him, and the first bond was executed by the surety only, A. and B. having neglected to procure the signature of the principal, it was held that the surety was not bound, though he received the bond of indemnity from A. and C. The surety had a material interest in the extent of the rights and remedies of the creditor against the principal debtor; and these being different from what he contemplated and contracted for, there was no claim against him (*s*). But if in such circumstances the principal debtor had executed some other instrument on which the surety might sue him and become his specialty creditor, he would have remained bound (*t*). Illustrations.

So where a surety executed a deed prepared by the creditor which appeared to contain a joint and several covenant by two co-sureties, but no other signature was provided by the creditor as co-surety, the surety who signed was discharged (*u*).

Where a person gave a promissory note as surety, upon an agreement that the amount should be advanced to the principal debtor by draft at three months, and the creditor, without the concurrence of the surety, paid the amount at once, the surety was discharged, on the ground of the variation of the agreement (*x*). Where persons agreed to

(*r*) *Bonser* v. *Cox*, 4 Beav. 379; 6 *ib.* 110.

(*s*) *Ibid.*; *Calvert* v. *London Dock Co.*, 2 Keen, 638; *Ellesmere Brewery* v. *Cooper*, (1896) 1 Q. B. 75; 65 L. J. Q. B. 173.

(*t*) *Cooper* v. *Evans*, 4 Eq. 45.

(*u*) *Evans* v. *Bremridge*, 2 K. & J. 174; 8 De G. M. & G. 101.

(*x*) *Bonser* v. *Cox*, *sup.*

become sureties for a contractor who was undertaking certain works, and the contract was that three-fourths of the work, as finished, should be paid for periodically and the remainder upon completion, payments having been made exceeding three-fourths of the work done, the sureties were released (*y*). The dealing with a security for a debt in a due course of management, as by selling mortgaged property, though without the knowledge of the surety, will not release him (*z*).

Where, as in *Dering* v. *E. of Winchelsea* (*a*), there is a bond of suretyship for the fidelity of an officer, and the nature of the office or its duties are materially changed so as to effect the peril of the sureties, the bond will be avoided (*b*). It is necessary, however, that the alteration should be such as to materially affect the surety (*c*). And if the change in liability is introduced by the fraud of the person whose fidelity is guaranteed the surety is not discharged (*d*). It may also be that the wording of the bond is extensive enough to continue the liability notwithstanding a material change (*e*).

Where a creditor takes a second security in satisfaction of the first, the surety is discharged (*f*). But the taking of an additional security not in lieu of the former one has no such effect (*g*).

(*y*) *Calvert* v. *London Dock Co.*, *sup.*; *Exp. Rushforth*, 10 Ves. 409.

(*z*) *Taylor* v. *Bank of N. S. W.*, 11 App. Cas. 596; 55 L. J. P. C. 47.

(*a*) 1 Cox, 318.

(*b*) *Bonar* v. *Macdonald*, 3 H. L. 226.

(*c*) *Sanderson* v. *Aston*, L. R. 8 Eq. Ex. 73; *Skillett* v. *Fletcher*, L. R. 1 C. P. 217.

(*d*) *Mayor of Kingston* v. *Harding*, (1892) 2 Q. B. 494; 62 L. J. Q. B. 55.

(*e*) *Oswald* v. *M. of Berwick*, 5 H. L. 856.

(*f*) *Clarke* v. *Henty*, 3 Y. & C. Ex. 187. See *Swire* v. *Redman*, 1 Q. B. D. 586.

(*g*) *Gordon* v. *Calvert*, 4 Russ. 581.

III. *The Effects of Releases and Compositions.*

1. *Release of, or composition with, the debtor.*

Release or composition discharges surety, unless surety concurs or the contrary is stipulated, or surety has already partially paid the debt,

Where a creditor releases, or compounds with the principal debtor, without the concurrence of the surety, and although it may be done by mistake or for the benefit of the surety, he will thereby discharge the surety unless there is a stipulation to the contrary (*h*). It would be a manifest fraud on the debtor to profess to release him, and then to sue the surety, who could forthwith sue the debtor (*i*). If, however, the surety has, previously to the release given to the debtor, paid part of the debt and given security for the remainder, the general rule will not apply. The liability of the surety will then rest on the security given, rather than on the original contract, and will remain in force (*k*).

or surety has converted himself into the principal debtor.

A surety may, by further contract with the creditor, convert himself, in relation to the debt for which he was surety, into a principal debtor; and then, upon a release being given to the party who was in the first instance the principal, he will lose the benefit of the doctrine that the release of the principal releases the surety (*l*).

Right against surety cannot be reserved after absolute release. *Secus*, in case of a covenant not to sue.

A creditor, if he has given an absolute legal or equitable release for a debt, cannot reserve his right to proceed against the sureties (*m*). Where, however, a release can be construed as a covenant not to sue, a reservation of remedies against the sureties is admissible. The covenant operates only as far as the rights of the surety are not affected; and since the surety remains liable, he retains his remedies over against the principal debtor (*n*). The

(*h*) *Exp. Smith*, 3 Bro. C. C. 1; *Davidson* v. *MacGregor*, 8 M. & W. 755; *Cragoe* v. *Jones*, L. R. 8 Ex. 81.

(*i*) *Nevill's Case*, 6 Ch. 47; *Tasmania Bank* v. *Jones*, (1893) A. C. 313; 62 L. J. P. C. 104.

(*k*) *Hall* v. *Hutchons*, 3 My. & K. 426.

(*l*) *Read* v. *Lowndes*, 23 Beav. 361.

(*m*) *Nicholson* v. *Revill*, 4 Ad. & E. 675; *Webb* v. *Hewitt*, 3 K. & J. 438.

(*n*) *Bateson* v. *Gosling*, L. R. 7 C. P. 9; *Bailey* v. *Edwards*, 4 B. & S. 774; *Green* v. *Wynn*, 4 Ch. 204; *Wyke* v. *Rogers*, 1 De G. M. & G. 408.

novation of the principal debt effects a release of the original debtor, and therefore of his surety (*o*). Where by operation of law a principal debtor is released, as, for instance, where a joint-stock company is reconstructed under a scheme of arrangement, the sureties are not thereby released (*p*).

2. *Release of, or composition with, one of two or more co-sureties.*

Release of one surety discharges others;

It is a settled principle that the release or discharge of one surety by a creditor operates as a discharge of the others, and this notwithstanding that it arises from a mistake of law (*q*).

not so composition;

It has, however, been held in equity that a mere composition with one of the sureties would not have that effect, and that at the same time the remedy against the co-surety might be expressly reserved (*r*). In such cases the co-surety is not damnified; for the creditor, by giving a discharge to one surety for the proportion which he was liable to contribute towards payment of the debt, has no right to proceed against the other sureties for more than their proportion of it (*s*).

nor a covenant not to sue.

If in this case, also, the release can be construed as a mere covenant not to sue, it will not operate as a discharge of the co-sureties (*t*). And if the sureties contract *severally*, the release of one does not discharge the other (*u*), unless the sureties' right to contribution has been lost or injuriously affected by the creditor's act.

(*o*) *Tasmania Bank* v. *Jones*, (1893) A. C. 13; 62 L. J. P. C. 104; *Head* v. *H.*, (1894) 2 Ch. 236; 63 L. J. Ch. 549.

(*p*) *Re English, &c. Chartered Bank*, (1893) 3 Ch. 385; 62 L. J. Ch. 825; *Dane* v. *Mortgage Corp.*, (1894) 1 Q. B. 54; 63 L. J. Q. B. 144.

(*q*) *Cheetham* v. *Ward*, 1 B. & P. 633; *Nicholson* v. *Revill*, 4 Ad. & E. 675; *Merc. Bank of Sydney* v. *Taylor*, (1893) A. C. 317.

(*r*) *Exp. Gifford*, 6 Ves. 805.

(*s*) *Stirling* v. *Forrester*, 3 Bligh, 591.

(*t*) *Price* v. *Barker*, 4 E. & B. 760; *Thompson* v. *Lack*, 3 C. B. 540, 552.

(*u*) *Ward* v. *Nat. Bank of New Zealand*, 8 App. Cas. 755; 52 L. J. P. C. 65; and see *Wegg-Prosser* v. *Evans*, (1895) 1 Q. B. 108; 64 L. J. Q. B. 1.

IV. *Continuing Suretyship or Guarantee.*

Cases in which the suretyship is not for a definite debt, but for a possible but uncertain liability, such as for discounting bills, or for the due performance of certain duties, give rise to special questions, especially with regard to revocation.

Guarantee not revoked by death, but usually revocable before liability incurred.

Such contracts are not necessarily revoked by the death of the surety (*x*); whether it is so or not depends on the terms of the instrument (*y*). If there be two co-sureties, the death of one does not discharge the survivor from future liability (*z*); but such guarantees are usually revocable at any time before a liability has been incurred in respect thereof (*a*); and they have been treated in equity as revoked when it was the duty of the representatives of the guarantor, with the knowledge of the creditors to whom the guarantee was given, to have given notice to determine the same (*b*).

Secus, guarantee for honesty of servant.

A person, however, who by a continuing guarantee becomes surety for the honesty of a servant, cannot ordinarily, during the continuance of the service, discharge himself by merely giving notice that he will be no longer liable (*c*). But if the guarantor discovers acts of dishonesty in the person for whom he has made himself answerable, he can at once revoke his guarantee (*d*).

Master may lose benefit of guarantee by concealment.

Where a master, who has in his employ a servant whose conduct has been guaranteed, discovers that the servant has been guilty of dishonesty, but nevertheless without the knowledge or consent, express or implied, of the

(*x*) *Bradbury* v. *Morgan*, 1 H. & C. 249; *Lloyd's* v. *Harper*, 16 Ch. D. 290; 50 L. J. Ch. 140; *Balfour* v. *Crace*, (1902) 1 Ch. 733.

(*y*) *Midland Ry. Co.* v. *Silvester*, (1895) 1 Ch. 573; 64 L. J. Ch. 390.

(*z*) *Beckett* v. *Addyman*, 9 Q. B. D. 783; 51 L. J. Q. B. 597.

(*a*) *Offord* v. *Davies*, 12 C. B. N. S. 748. But see 31 L. J. Exch. 462.

(*b*) *Harriss* v. *Fawcett*, 8 Ch. 866.

(*c*) *Calvert* v. *Gordon*, 7 B. & C. 809; *Gordon* v. *Calvert*, 4 Russ. 581.

(*d*) *Burgess* v. *Eve*, 13 Eq. 457; *Lloyd's* v. *Harper*, *sup.*

guarantor, continues such servant in his employ, he cannot claim anything from the guarantor in respect of subsequent acts of dishonesty (*e*). But it seems that if in such a case the person suing the guarantor is not in a position which gives him power to dismiss the employée, the guarantee remains in force (*f*).

V. *Contribution between Co-sureties.*

Principle of contribution in equity.

Dering v. *E. of Winchelsea.*

In the important case of *Dering* v. *The Earl of Winchelsea* (*g*), it was laid down that the *right of contribution between co-sureties depended on the general principles of equity, and not on the form or nature of the contract between the parties.* In that case, Thomas Dering, having been appointed collector of Customs duties, entered into bonds to the Crown with three sureties for the due performance of his office. His brother, Sir Edward Dering, together with the Earl of Winchelsea and Sir John Rous, became sureties for him accordingly. Thomas Dering and Sir E. Dering executed one joint and several bond in a penalty of £4,000, Thomas Dering and the Earl of Winchelsea executed another similar bond, and Thomas Dering and Sir John Rous a third, all conditioned alike upon the due performance by Thomas Dering of his duty as collector. Thomas Dering being in arrear to the Crown to the amount of £3,883 14*s.* 0*d.*, the Crown put the first bond in suit against Sir E. Dering, and obtained judgment thereon for that sum. Thereupon Sir E. Dering filed this bill against the Earl of Winchelsea and Sir John Rous, claim-

(*e*) *Phillips* v. *Foxhall*, L. R. 7 Q. B. 666. See *M. of Durham* v. *Fowler*, 22 Q. B. D. 394; 58 L. J. Ch. 246; *Seaton* v. *Burnand*, (1900) A. C. 135; 69 L. J. Q. B. 409.

(*f*) *Lawder* v. *L.*, I. R. 7 C. L. 57.

(*g*) 1 Cox, 318; 1 W. & T. L. C. 106.

ing from them contribution towards the sum so recovered against him. It was held by Lord Chief Baron Eyre that there must be equal contribution by the defendants. Notwithstanding that the parties were bound in different instruments, they were co-sureties for the same principal, and in the same engagement, and were bound in conscience to contribute proportionally to the penalties of the bonds. In that case the penalties were equal, but the principle would have been the same if they were bound in different sums, except that contribution in that case could not be required beyond the sum for which they had become bound (*h*), and moreover the contribution in that case would be not equal but proportionate to their respective liabilities (*i*).

In *Stirling* v. *Forrester* (*k*), Lord Redesdale again held that the right and duty of contribution was founded in doctrines of equity; that the principle was the same as in cases of average, and that it would be against equity for a creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment; he was bound, seldom by contract, but always in conscience, as far as he was able, to put the party paying the debt upon the same footing with those who were equally bound. The principle may now, therefore, be considered as firmly established. It seems, even, that the right of a surety to enforce contribution will not be affected by his ignorance at the time he became surety that there were co-sureties (*l*); and it may be asserted even before actual payment of the debt (*m*).

Principle not applicable where sureties

Such transactions as that in *Dering* v. *E. Winchelsea* must, however, be distinguished from those in which

(*h*) *Whiting* v. *Burke*, 6 Ch. 342; *Coles* v. *Peyton*, (1893) 3 Ch. 238; 62 L. J. Ch. 991.

(*i*) *Ellesmere Brewery* v. *Cooper*, (1896) 1 Q. B. 75; 65 L. J. Q. B. 173.

(*k*) 3 Bligh, 590.

(*l*) *Craythorne* v. *Swinburne*, 14 Ves. 160, 163.

(*m*) *Wolmershausen* v. *Gullick*, (1893) 2 Ch. 514; 62 L. J. Ch. 773.

bound for different portions of the debt.

sureties are bound by different instruments for distinct portions of a debt due from a principal. If the suretyship of each is a separate and distinct transaction, the doctrine does not apply, and there will be no right of contribution among the sureties (*n*). A surety is not entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt due by the creditor, even though the co-surety has not been required to pay anything, unless, indeed, the co-surety has been released by the creditor (*o*).

Principle may be qualified or excluded by contract.

Although the principle of contribution is a constructive doctrine of equity and not founded upon contract, still a person may by contract qualify or take himself out of the reach of the principle: for instance, where three co-sureties agreed among themselves that in case of the failure of the principal debtor to pay they would each contribute his respective part, one of them having paid the debt and another become insolvent, it was held that the remaining one could only be required to contribute one-third, not one-half, which, in the absence of such an agreement, would have been his liability (*p*).

Similarly a person may contract himself entirely out of the principle, and become a merely collateral surety by limiting his liability to payment in case of the default of the principal and other sureties (*q*), and parol evidence is admissible to show what the real contract was, so as to avoid the application of the doctrine of contribution (*q*).

Parol evidence admissible.

Though by the law merchant the indorsers of a bill or note are liable in succession, a subsequent indorser having a right to indemnity against all that are prior to him, all the facts of the case will be considered: and if it appears that the indorsers were in fact in the position of co-sureties,

(*n*) *Coope* v. *Twynam*, 1 T. & R. 426; *Arcedeckne* v. *Howard*, 20 W.R. 879.

(*o*) *Davies* v. *Humphreys*, 6 M. & W. 153; *Re Snowdon*, 17 Ch. D. 44; 50 L. J. Ch. 540.

(*p*) *Swain* v. *Wall*, 1 Ch. Rep. 80.

(*q*) *Craythorne* v. *Swinburne*, 14 Ves. 160.

they will be liable to equal contribution; there will be no priority (*r*).

Sureties who have paid the debt are not only entitled to contribution from the other sureties, but also to the benefit of any security which any of them may have taken from the principal debtor by way of indemnity (*s*), unless, at least, there was originally a contract for the special indemnity to one of the number (*t*). The benefit of a security given by the principal debtor to his surety cannot, however, be claimed by the principal creditor (*u*).

Sureties entitled to securities.

VI. *The Right of Surety to Securities.*

A surety is entitled, on the payment of the debt, to all the securities which the creditor has against the principal debtor, whether given at the time of the contract or subsequently, and whether given with or without the knowledge of the surety or of the principal (*x*). The same right appertains to sureties who become such by indorsement of a bill of exchange (*y*).

Consequently, if a creditor who has had, or ought to have had, such securities, loses them, or suffers them to get back into the possession of the debtor, or fails through neglect to make them effectual, as by failing to give proper notice, the surety will, to the extent of such security, be

Loss of securities by creditor discharges surety.

(*r*) *Macdonald* v. *Whitfield*, 8 App. Cas. 733; 52 L. J. P. C. 70.

(*s*) *Swain* v. *Wall*, 1 Ch. Rep. 80; *Berridge* v. *B.*, 44 Ch. D. 168; 59 L. J. Ch. 533.

(*t*) *Cooper* v. *Jenkins*, 32 Beav. 337; *Steel* v. *Dixon*, 17 Ch. D. 825; 50 L. J. Ch. 591.

(*u*) *Sheffield Bank* v. *Clayton*, (1892) 1 Ch. 621; 61 L. J. Ch. 234.

(*x*) *Mayhew* v. *Crickett*, 2 Swanst. 185; *Pearl* v. *Deacon*, 24 Beav. 186; 1 De G. & J. 461; *Lake* v. *Brutton*, 18 Beav. 34; 8 De G. M. & G. 440; *Pledge* v. *Buss*, Johns. 663, 668.

(*y*) *Duncan* v. *N. & S. W. Bank*, 6 App. Cas. 1; 11 Ch. D. 88; 50 L. J. Ch. 355.

discharged (*z*). If the security has become worthless otherwise than by the act or neglect of the creditor, its loss, of course, effects no discharge (*a*).

Surety entitled to all equities against persons claiming under the debtor;

A surety who pays off a debt is entitled not only to all the equities which the creditor could have enforced against the principal debtor, but also to those available against persons claiming under him. Thus where A. mortgaged an estate to C., and B. became A.'s surety for the debt, and afterwards A. mortgaged the estate again to D., who had notice of the first mortgage, the first mortgage being paid off partly by B., he was held to have priority over D. for the amount so paid, notwithstanding that D. got a transfer of the legal estate (*b*).

can only claim what he actually pays.

On the other hand, if a surety discharges an obligation at less than its full amount, he cannot, as against the principal debtor, claim the whole amount, but only what he has actually paid in discharge (*c*). His right, however, to the benefit of a collateral security is not in abeyance until he is required to pay (*d*).

If a surety obtains from the principal debtor a counter-security for the liability which he has undertaken, he must bring into hotchpot for the benefit of the co-sureties whatever he receives from that source, even though he consented to be surety only upon the terms of having the security, and the co-sureties were at the time of the contract ignorant of the security having been given (*e*).

Principle applies to all kinds of securities.

Judgments.

The principle has been applied to almost every kind of security. Where the creditor obtained a judgment against the principal debtor, and the surety paid the debt, it was held that he was entitled to an assignment of the judg-

(*z*) *Capel* v. *Butler*, 2 S. & S. 457; *Law* v. *E. I. Co.*, 4 Ves. 824; *Strange* v. *Fooks*, 4 Giff. 408; *Taylor* v. *Bank of N. S. W.*, 11 App. Cas. 596, 603; 55 L. J. P. C. 47.

(*a*) *Hardwick* v. *Wright*, 35 Beav. 133; *Rainbow* v. *Juggins*, 5 Q. B. D. 138, 422.

(*b*) *Drew* v. *Lockett*, 32 Beav. 499.

(*c*) *Reed* v. *Norris*, 2 My. & Cr. 361, 375.

(*d*) *Dixon* v. *Steel*, (1901) 2 Ch. 602; 70 L. J. Ch. 794, explaining *South* v. *Bloxam*, 2 H. & M. 457.

(*e*) *Steel* v. *Dixon*, 17 Ch. D. 825; *Atkins* v. *Arcedeckne*, 24 Ch. D. 709; 53 L. J. Ch. 102; *Berridge* v. *B.*, 44 Ch. D. 168.

ment (*f*). But it was questioned whether such assignment was of any effect, since the payment had been considered to discharge the judgment, and so make it valueless (*g*).

Similarly, where a debt was secured by a bond, it was at one time considered that a surety who paid it was entitled to an assignment of the debt and bond. But in *Copis* v. *Middleton* (*h*), and *Hodgson* v. *Shaw* (*i*), it was decided that on payment of the debt the bond ceased to exist, and was no longer available as a security. Bonds.

By the Mercantile Law Amendment Act, 1856 (*k*), however, the law both as to judgments and bonds was established in favour of sureties, it being, by sect. 5 thereof, enacted that a surety who pays off a debt so secured shall be entitled to have assigned to him every judgment, specialty, or security which shall be held by the creditor in respect of such debt, whether such judgment, &c., shall or shall not at law be deemed to have been satisfied by the payment of the debt. This Act is applicable to a contract made before it was passed, where payment has been made by a surety since that time (*l*). A surety who has satisfied a judgment is entitled to the benefit of the Act though he may not in fact have obtained an assignment of the judgment (*m*). 19 & 20 Vict. c. 97.

A creditor who takes out execution against the debtor is a trustee of it for all parties interested. If, therefore, he withdraws it without the knowledge of the sureties, he thereby discharges them (*n*). So, also, if he loses the benefit of it by neglect (*o*).

Where a creditor advances a further sum upon a security, Further

(*f*) *Parsons* v. *Briddock*, 2 Vern. 608.
(*g*) *Armitage* v. *Baldwin*, 5 Beav. 278; *Hodgson* v. *Shaw*, 3 My. & K. 183, 191.
(*h*) 1 T. & R. 229.
(*i*) *Sup.*
(*k*) 19 & 20 Vict. c. 97.
(*l*) *In re Cochran's Estate*, 5 Eq. 209.
(*m*) *Lightbown* v. *McMyn*, 33 Ch. D. 575; 55 L. J. Ch. 845; *Morgan* v. *Hill*, (1894) 3 Ch. 400; 54 L. J. Ch. 6.
(*n*) *Mayhew* v. *Crickett*, 2 Swanst. 185, 190.
(*o*) *Watson* v. *Allcock*, 1 S. & G. 319; 4 De G. M. & G. 242.

advance on security.

Distinct securities for separate debts.

Tacking.

a surety for the original debt is entitled to the security on paying that debt only (*p*). But where separate debts are due upon distinct securities from the principal debtor to the creditor, the latter will not lose his right to tack from the fact that a third party who has become surety for one of the debts has paid off that debt (*q*), unless, at any rate, the mortgagee has been guilty of some concealment or misrepresentation (*r*).

(*p*) *Newton* v. *Chorlton*, 10 Ha. 646; *Forbes* v. *Jackson*, 19 Ch. D. 615; 51 L. J. Ch. 690, not following *Williams* v. *Owen*, 13 Sim. 597.

(*q*) *Farebrother* v. *Wodehouse*, 23 Beav. 18.

(*r*) *Bowker* v. *Bull*, 1 Sim. N. S. 29.

CHAPTER VII.

MARRIED WOMEN.

SECT. I. EQUITABLE DOCTRINES AS TO MARRIED WOMEN.

General Comparison of Law and Equity.

I. *Separate Estate in Equity.*
Restraint on Anticipation.
Pin-Money.
Paraphernalia.

II. *The Equity to a Settlement.*
1. *The Nature of the Right.*
2. *Out of what Property it can be claimed.*
3. *Waiver.*
4. *How barred.*
5. *Amount settled.*
6. *Form of Settlement.*
7. *How far binding on Creditors.*

Reduction into Possession by Husband.

III. *Fraud on Marital Rights.*

General Comparison of Law and Equity.

1. *Position of married women at common law.*

(1.) By the common law, a husband on his marriage became entitled absolutely to all his wife's chattels personal in possession. If he reduced her choses in action into possession during the coverture, he similarly became entitled to them; if he survived his wife without having

Husband's rights in his wife's property.

Personalty.

reduced them into possession, he was entitled to recover them as her administrator on taking out administration. But if he died before his wife without having reduced them into possession, the wife was entitled. He also acquired full power over her legal chattels real, in possession and reversion; but if he died before his wife without having aliened them, they survived to her. He was likewise entitled to receive the rents and profits of the wife's real estate during their joint lives.

Realty.

Such were the extensive rights with which a husband was by law invested in consideration of the obligation which he incurred by the marriage of maintaining his wife. Yet at the same time the wife had no legal remedy in case of his refusing or neglecting to perform the duties in consideration of which he acquired these rights, nor could she claim any release in the case of his insolvency or bankruptcy. The property which had been hers, however large, was as much at the mercy of his creditor as of himself.

Wife could not be sued.

(2.) On the other hand, the wife could not be sued in any way, even for necessaries. In certain cases her contracts for necessaries might bind her husband, but never herself or the property which had been hers. Her separate existence was not contemplated; it was merged by the coverture in that of her husband, and she was no more recognised in Courts of law than a *cestui que trust* or a mortgagor (*a*).

2. *The position of married women in equity.*

Such being the rigid rules of law as to the status of a married woman, it is not surprising that Courts of equity should have found ample grounds for interference, and should have established a system of doctrines more consonant with reason and justice.

(*a*) Blackstone, II., 433, 435; Coke upon Littleton, 300*a*, 351*b*; *Betts* v. *Kimpton*, 2 B. & Ad. 277; *Murray* v. *Barlee*, 2 My. & K. 220, 222; *In the goods of Harding*, 2 P. & D. 394.

These doctrines are reducible to two leading principles—first, the recognition by equity of the separate estate of a married woman, with reference to which she is regarded and treated as if she were a *feme sole;* secondly, the principle which requires a husband who receives property in the right of his wife to make a proper settlement thereout on his wife and children.

Until quite recently, the assistance thus afforded to married women by Courts of equity constituted one of the most extensive and beneficial branches of their jurisdiction, and the subjects falling thereunder called for exposition in considerable detail; and though the Legislature, so long ago as 1870, so far recognised the hardship often occasioned by the antiquated doctrines of the common law as to provide legal protection in certain cases for the interests of married women, the statute then passed (*b*) was of very limited application, and scarcely diminished the importance of the equitable jurisdiction in question. The Married Women's Property Act of 1882 (*c*), however, by the sweeping enactment that "a married woman shall be "capable of acquiring, holding and disposing by will or "otherwise, of any real or personal property as her "separate property, in the same manner as if she were "a *feme sole*," at one stroke reduced the importance of this branch of equity to a very considerable degree. The possession of property by a married woman free from the control of her husband, which was previously exceptional and dependent upon the doctrines deducible from a series of decisions in the Court of Chancery, at once became a general statutory right, so that thenceforth the first of the principles above stated remained of importance only for the limited purposes hereafter to be indicated. Still more completely was the principle which recognised a wife's equity to a settlement undermined, remaining, as we shall presently see, applicable only to women married prior to

(*b*) 33 & 34 Vict. c. 93. (*c*) 45 & 46 Vict. c. 75.

the commencement of the Act, and as to them affecting only a small and rapidly vanishing class of proprietary interests.

Under these circumstances, it becomes necessary for the writer, in dealing with the subject of married women's property, to concern himself mainly with the statute which now covers almost the whole of the questions concerned. And though for the present, at least, the equitable doctrines cannot be ignored, their exposition may be reduced in proportion as has been their importance.

The most convenient method of dealing with the subject under the altered conditions will be, first, to review the equitable doctrines in the new light in which the statute law has placed them, and then to turn to the enactment itself, adding such comments and explanations as may be required.

Our first inquiry will be as to the manner of creating and as to the characteristics of equitable separate estate.

I. *Separate Estate in Equity.*

Creation of separate estate.

By a series of important decisions it was long ago determined that equity would treat a married woman as capable of owning property of any description to her own use, independently of her husband, and would hold her entitled to enjoy it with all its privileges and incidents including the *jus disponendi* (*d*).

Depends on intention.

In order that property belonging to a woman at the time of her marriage, or subsequently conferred on her, may be deemed her equitable separate estate, it is requisite that equity should be able to discern either from the terms of the instrument through which she receives the property,

(*d*) *Fettiplace* v. *Gorges*, 1 Ves. jr. 46.

or from the nature of the transaction by which she acquires it, an intention that she should have the sole use thereof. If, in that case, it is in the hands of trustees, they will be held trustees for her. And if no trustees have been appointed equity will treat the husband as her trustee (*e*).

Form of words immaterial.

No particular form of words, whether in a settlement or will, is required to vest property in a married woman to her separate use, as long as the intention to give her such an interest in opposition to the legal rights of her husband is clear and unequivocal (*f*).

Illustrations.

The following expressions have been held to be sufficient to exclude the marital rights of the husband—a gift or settlement to the wife, or to trustees for her, for her "sole and separate use" (*g*); "for her separate use" (*h*); "for her own use, and at her own disposal" (*i*); "for her own use, independent of her husband" (*k*); "for her own use and benefit, independent of any other person" (*l*); "that she should receive and enjoy the issue and profits" (*m*); or where there is a direction that the "interests and profits be paid to her, and the principal to her, or to her order by note in writing under her hand" (*n*); or "her receipt to be a sufficient discharge" (*o*); or that the husband "is to have no control" (*p*).

Intention must be clear.

On the other hand, since an unequivocal intention to exclude the husband's rights must be shown, it has been held that no separate use is created by a direction "to pay to a married woman and her assigns" (*q*); or to pay a fund "into her own proper hands to and for her own use

(*e*) *Newlands* v. *Paynter*, 4 My. & Cr. 408; *Parker* v. *Brooke*, 9 Ves. 583; *Rich* v. *Cockell*, 9 Ves. 375; *Wassell* v. *Leggatt*, (1896) 1 Ch. 554; 65 L. J. Ch. 240.

(*f*) *Stanton* v. *Hall*, 2 R. & My. 180.

(*g*) *Parker* v. *Brooke*, *sup.*

(*h*) *Massy* v. *Rowen*, L. R. 4 H. L. 288, 294.

(*i*) *Inglefield* v. *Coghlan*, 2 Coll. 247.

(*k*) *Wagstaffe* v. *Smith*, 9 Ves. 520.

(*l*) *Margetts* v. *Barringer*, 16 Sim. 568.

(*m*) *Tyrrell* v. *Hope*, 2 Atk. 558.

(*n*) *Hulme* v. *Tenant*, 1 Bro. C. C. 16.

(*o*) *Lee* v. *Prieaux*, 3 Bro. C. C. 381.

(*p*) *Edward* v. *Jones*, 14 W. R. 815.

(*q*) *Lumb* v. *Milnes*, 5 Ves. 517.

and benefit" (*r*); or where property is given "to her own use and benefit" (*s*); "to her absolute use" (*t*); or "to her own proper use and benefit" (*u*); or "to be under her sole control" (*x*).

Distinction between gifts to *feme sole* and *feme covert*.

A distinction must be observed between the effect of certain words used in a gift to a woman already married, and the same words in a gift to a *feme sole* or widow. The expression "*separate* use" has a technical meaning, and is sufficient, whether the gift be to a married or to an unmarried woman, with or without the intervention of trustees, to impress the property given with the character of separate estate (*y*). But the expression "*sole* use" has no such technical meaning, and its interpretation depends on circumstances. The result of the cases is that if the words "sole use and benefit" are applied to a gift to a woman already married, they will suffice to exclude the husband's marital right, and to create a separate estate (*z*). Also if the intended beneficiary be a woman about to marry, or there are other expressions in the instrument from which it can be gathered that a future marriage was contemplated by the settlor or donor, these words will import exclusion of the husband, and will create a separate estate (*a*). Further, if in any case these words are used, and the property is at the same time vested in trustees, it seems that they will be considered sufficient to create a separate estate (*b*). But if the gift is to a woman unmarried, and not in contemplation of marriage, or to a widow, and without the interposition of trustees, the words "sole use and benefit" will not of themselves import ex-

(*r*) *Tyler* v. *Lake*, 2 R. & My. 183.
(*s*) *Kensington* v. *Dollond*, 2 My. & K. 184.
(*t*) *Exp. Ablot*, 1 Dea. 338.
(*u*) *Blacklow* v. *Laws*, 2 Ha. 49.
(*x*) *Massey* v. *Parker*, 2 My. & K. 174.
(*y*) *Massy* v. *Rowen*, L. R. 4 H. L. 288.
(*z*) *Inglefield* v. *Coghlan*, 2 Coll. 247; *Green* v. *Britten*, 1 De G. J. & S. 649; *Hartford* v. *Power*, I. R. 2 Eq. 212; *Bland* v. *Dawes*, 17 Ch. D. 794; 50 L. J. Ch. 252.
(*a*) *Exp. Ray*, 1 Madd. 199, 207; *In re Tarsey's Trust*, 1 Eq. 561; *Exp. Killick*, 3 M. D. & De G. 480.
(*b*) *Adamson* v. *Armitage*, 19 Ves. 416.

clusion of a future husband, and will not suffice to impress on the property the character of separate estate (*e*).

Presents to wife.

Presents from a husband to his wife will be deemed separate estate where they are made absolutely and not merely to be worn as personal ornaments (*d*). So a husband may make himself trustee for his wife of property to be held as her separate estate (*e*). But as regards real estate, a mere written declaration by a husband without his wife's concurrence will not suffice to impress upon it the character of separate estate, since the husband has not such an interest in the property as enables him to create a trust therein (*f*). It seems that a gift from a stranger to a married woman, though not expressed to be for her separate use, would be considered separate estate (*g*).

Savings out of separate property.

The savings which a married woman may make out of separate property are considered as separate estate (*h*). She has the same power with respect to them, and they are subject to the same liabilities (*i*). Similarly, arrears of separate estate in the hands of trustees will be considered as retaining their original character (*k*). Where, also, a husband living separate from his wife remits money to her for her support and maintenance, such money, and any savings which the wife may make out of it, will be considered separate estate (*l*).

Outlay on separate property.

A married woman is entitled as to separate estate to any outlay made by her husband on real property settled to her separate use—for instance, to houses which he builds thereon, or improvements made (*m*).

(*c*) *Gilbert* v. *Lewis*, 1 De G. J. & S. 38; *Lewis* v. *Matthews*, 2 Eq. 177; *Massy* v. *Rowen*, *sup.*; *Hartford* v. *Power*, *sup.*

(*d*) *Graham* v. *Londonderry*, 3 Atk. 393; *Grant* v. *G.*, 34 Beav. 623; *Tasker* v. *T.*, (1895) P. 1; 64 L. J. P. D. 36.

(*e*) *Mews* v. *M.*, 15 Beav. 529.

(*f*) *Dye* v. *D.*, 13 Q. B. D. 147; 53 L. J. Q. B. 442.

(*g*) *Graham* v. *Londonderry*, *sup.*

(*h*) *Gore* v. *Knight*, 2 Vern. 535; *Askew* v. *Rooth*, 17 Eq. 426.

(*i*) *Butler* v. *Cumpston*, 7 Eq. 16.

(*k*) *Ashton* v. *McDougall*, 5 Beav. 56.

(*l*) *Brooke* v. *B.*, 25 Beav. 34 *Haddon* v. *Fladgate*, 1 Sw. & Tr. 48.

(*m*) *Barrack* v. *McCulloch*, 3 K. & J. 110, 124; *Grant* v. *G.*, *sup.*

Having thus illustrated how under the protection of equitable tribunals married women acquired property to their separate use, free from marital control, the next consideration is to inquire as to the powers they possess over such property, and the liabilities to which it is subject.

Powers of alienation.

Putting out of view for the present that special class of cases in which by the operation of another device of equity a married woman is expressly restrained from alienation, the following rules briefly indicate her powers of voluntary disposition respecting the different kinds of separate estate.

Personalty settled absolutely alienable.

As to personalty settled upon a married woman for her separate use, it is well established that she may enjoy it with all its incidents, and may dispose of it either by acts *inter vivos* or by will (*n*); and this whether the property be in possession or reversion (*o*).

Real estate.

As to real estate she has a complete power of disposition over the rents and profits (*p*); and she may dispose of the equitable fee at her pleasure (though there may be no express power of appointment given) either by will or deed, which need not be acknowledged under 3 & 4 Will. IV. c. 74 (*q*); and she has this power whether or not the estate is vested in trustees (*r*).

She may transfer her interest also as well to her husband as to anyone else (*s*), though a husband so receiving property must be prepared to show that it was clearly intended as a gift (*t*). Moreover, a disposition by a wife of her equitable estate in fee simple is sufficient to completely bar and exclude the estate which on her death would otherwise have passed to the husband by the curtesy (*u*). For the

(*n*) *Fettiplace* v. *Gorges*, 1 Ves. jr. 46; 3 Bro. C. C. 8; *Rich* v. *Cockell*, 9 Ves. 369; *Willock* v. *Noble*, L. R. 7 H. L. 580.

(*o*) *Sturgis* v. *Corp*, 13 Ves. 190; *Stamford, &c. Bank* v. *Ball*, 4 De G. F. & J. 310, *inf.*, p. 423.

(*p*) *Stead* v. *Nelson*, 2 Beav. 245; *Major* v. *Lansley*, 2 R. & M. 357.

(*q*) *Taylor* v. *Meads*, 4 De G. J. & S. 597.

(*r*) *Hall* v. *Waterhouse*, 13 W. R. 633.

(*s*) *Grigby* v. *Cox*, 1 Ves. sr. 518.

(*t*) *Rich* v. *Cockell*, 9 Ves. 375.

(*u*) *Appleton* v. *Rowley*, 8 Eq. 139; *Cooper* v. *Macdonald*, 7 Ch. D. 288.

alienation of the legal fee, however, a deed acknowledged under the said statute and the concurrence of the persons in whom the legal estate was vested, remained necessary.

Assignment by husband.

It may be here conveniently mentioned that if a husband, in exercise of his legal right, assigned his wife's separate estate to a purchaser for value without notice, she had no remedy against the purchaser (*v*).

It is scarcely necessary to say that where there is a gift absolutely to a married woman, but only the life interest is limited to her separate use, the *corpus* of the estate, being unaffected by the separate use, is not in her power, and an attempted devise thereof would be invalid (*x*); but after some conflict of decision it was ultimately established that where there is a gift to a wife to her separate use for life, remainder as she shall, notwithstanding her coverture, by deed or will appoint, it will be treated as an absolute gift to her sole and separate use, so as to fully vest in her the entire *corpus* for all purposes (*y*).

Life interest with power of appointment.

Permitting husband to receive income.

A wife may, in effect, alienate the income of her separate estate by expressly or impliedly authorising her husband to receive it. And if she does so, she cannot afterwards call upon him to account for the same (*z*); nor can she recover it from trustees who have paid the husband with her acquiescence (*a*). But in order thus to deprive a wife of the arrears of income on the ground of her acquiescence, her intention to permit the husband to receive the income must be clearly shown, and the onus of proof is on him (*b*). In the absence of this she will be entitled to all the income in arrear, not confined to one year as in the case of arrears of pin-money (*c*).

(*v*) *Dawson* v. *Prince*, 4 De G. & J. 41.

(*x*) *Troutbeck* v. *Boughey*, 2 Eq. 534.

(*y*) *London Chartered Bank of Australia* v. *Lempriere*, L. R. 4 P. C. 572; *Bishop* v. *Wall*, 3 Ch. D. 194.

(*z*) *Caton* v. *Rideout*, 1 Mac. & G. 599; *Edward* v. *Cheyne*, 13 App. Cas. 385.

(*a*) *Rowley* v. *Unwin*, 2 K. & J. 138.

(*b*) *Wood* v. *Cock*, 40 Ch. D. 461; 58 L. J. Ch. 518.

(*c*) *Dixon* v. *D.*, 9 Ch. D. 587; *Parker* v. *Brooke*, 9 Ves. 583.

Liability of separate estate to debts.

The law as to the liability of separate estate in equity to the debts and engagements of married women has steadily and continually developed in the direction of favouring creditors, and treating the separate estate just as the absolute property of a man would be treated.

Fraud.

1. The strongest case for attaching liability to separate estate is where a married woman has been guilty of fraud. Long before the capability of a married woman to bind her separate estate by contracts was recognised, it was settled that she was capable of committing fraud, and was liable to the usual consequences of such an act. Thus in *Savage* v. *Foster* (*d*), where a married woman knowing her own title to property, suffered a purchaser to acquire it for valuable consideration by concealing her title, she was not allowed afterwards to set up her title against the purchaser. In cases of fraud, moreover, property settled on her for life with a general power of appointment which she exercises, is, equally with property settled on her absolutely, liable to supply any deficiency (*e*).

Breach of trust.

2. A married woman will render her separate estate liable by *actively* concurring with her trustees in a breach of trust (*f*), and she cannot call upon the trustees to replace it (*g*). So by herself committing a breach of trust in respect of other property under the trust (*h*) she renders her separate estate liable, unless she is restrained from anticipation (as to which generally, see *infra*, p. 405 *et seq.*); and, notwithstanding such restraint, arrears of income under the trust are also liable (*i*), but not future income (*j*).

Liability to debts.

3. It was long after the recognition for many purposes of separate estate, that a married woman was first deemed capable of contracting debts in respect of such estate; and

(*d*) 9 Mod. 35.
(*e*) *Vaughan* v. *Vanderstegen*, 2 Drew. 165.
(*f*) *Brewer* v. *Swirles*, 2 Sm. & G. 219; *Jones* v. *Higgins*, 2 Eq. 538; *Sawyer* v. *S.*, 28 Ch. D. 595; 54 L. J. Ch. 444.
(*g*) *Crosby* v. *Church*, 3 Beav. 485.
(*h*) *Clive* v. *Carew*, 1 J. & H. 199.
(*i*) *Pemberton* v. *M'Gill*, 1 Dr. & Sm. 266.
(*j*) *Ibid.*; *Clive* v. *Carew*, *supra*.

it is only quite recently that her capacity to do so has been fully accepted with all its consequences.

Specialty debts.

As might have been expected, the first step was to hold that specialty debts, such as those secured by a bond under her hand and seal, should be binding on her to the extent of her separate property. As to this the case of *Hulme* v. *Tenant* (*k*) is a leading authority.

Negotiable instruments.

4. Then the principle was extended to instruments of a less formal character, such as a bill of exchange accepted (*l*) or endorsed (*m*), and to a promissory note (*n*).

Written agreements generally.

5. The next step was its application to general written agreements—for instance, an agreement to pay additional rent for a house (*o*); also to the payment of the costs of a solicitor whom she had instructed (*p*).

Verbal contracts.

6. Up to this point the principle on which the separate estate was held to be liable was often represented to be that the written engagements in question operated as appointments of the settled property, and acquired their validity as such, rather than as contracts; and as long as it rested on this ground it is clear that no liability could arise from merely verbal contracts. But by many authoritative decisions this view of the question has been completely exploded (*q*), and it is now well established that separate estate will be bound by general verbal engagements, whether in the form of express contract or of the nature of an *assumpsit* (*r*); though of course the fact of the party being a married woman will not dispense with the necessity of a written contract, where it is otherwise required (*s*).

Life estate

7. It yet remained to be decided whether a married

(*k*) 1 Bro. C. C. 16.
(*l*) *Stuart* v. *Kirkwall*, 3 Madd. 387; *Owen* v. *Homan*, 4 H. L. 997.
(*m*) *M'Henry* v. *Davies*, 6 Eq. 462; 10 Eq. 88.
(*n*) *Bullpin* v. *Clarke*, 17 Ves. 365; *Field* v. *Sowle*, 4 Russ. 112.
(*o*) *Master* v. *Fuller*, 4 Bro. C. C. 19; 1 Ves. 513.
(*p*) *Murray* v. *Barlee*, 3 My. & K. 210.
(*q*) *Murray* v. *Barlee*, 3 My. & K. 210, 223; *Owens* v. *Dickenson*, Cr. & Ph. 53.
(*r*) *Vaughan* v. *Vanderstegen*, *sup.*; *Johnson* v. *Gallagher*, 3 De G. F. & J. 494; *Matthewman's Case*, 3 Eq. 787.
(*s*) *Re Sykes' Trust*, 2 J. & H. 415.

with general power of appointment by deed or will.

woman's general engagements would bind property settled on her for life with a general power of appointment which she has exercised. At length, in an important case already referred to (*t*), it was held that where such general power of appointment was exerciseable by *deed or will*, the property might be charged by her act. It has more recently been decided, where property was settled on a married woman for her separate use for life, with remainder to such persons as she should *by her will* appoint, she having made a testamentary appointment, that the property was liable to the payment of her debts, as if it had been settled on her absolutely (*u*). It will be observed that here the power of appointment could only be exercised *by will*. *A fortiori*, therefore, would property be liable which was subject to appointment by will or deed. This decision, as we shall see, has been confirmed by the Act of 1882 (*v*). Of course it will also be noted that such liability only arises in cases where the power has been exercised; it cannot affect persons entitled under a gift over in default of appointment.

By will only.

Extent of the liability.

8. The extent of the liability was by *Hulme* v. *Tenant* (*x*) shown to reach to the whole of any personal property settled, and to the rents and profits of the realty. But since the case of *Taylor* v. *Meads* (*y*) it will be consistent that it should be extended to the *corpus* of the realty as well as to that of personalty. It was held in equity, that the general engagements of a married woman could only be enforced against so much of her separate estate as she was entitled to, free from any restraint on anticipation, at the time when the engagements were entered into (*z*), and this was quite consistent with the principle, since equity regarded the liability as arising not strictly *ex contractu*,

(*t*) *London Chartered Bank, &c.* v. *Lempriere*, L. R. 4 P. C. 572.

(*u*) *In re Harvey's Estate; Godfrey* v. *Harben*, 13 Ch. D. 216.

(*v*) 45 & 46 Vict. c. 75, s. 4; *Turner* v. *King*, (1895) 1 Ch. 361; 64 L. J. Ch. 252; *Darley* v. *Hodgson*, (1899) 1 Ch. 666; 68 L. J. Ch. 313.

(*x*) 1 Bro. C. C. 16.

(*y*) 4 De G. J. & S. 597.

(*z*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; 50 L. J. Ch. 394.

but by way of charge (*a*) or *quasi* charge; in no case could a personal decree in respect of debts be made against a married woman (*b*). The recent Act, however, has expressly conferred contractual power on married women, and consistently with this change, it has enacted that for the future, *i.e.*, as to the contracts made after the 1st of January, 1883, not only the then present, but also all future accruing separate property is bound (*c*). The effect of the restraint on anticipation is not interfered with, but in the absence of this, all legal or equitable separate property which she may have at the time of the judgment is liable to execution (*d*).

Administration of married woman's estate.

After the death of a *feme covert* having separate estate, creditors may proceed against her separate estate for the payment of their debts, and such estate being equitable assets, the debts will rank *pari passu* (*e*). If she has left a will, her estate will be administered according to the ordinary rules in creditors' suits (*f*).

Restraint on Anticipation.

Origin of restraint on anticipation.

It is not surprising that the fact of its being held that the separate property of a married woman should be enjoyed by her with as much freedom of disposition, and subject to the same liabilities as if she were a *feme sole*, should have exercised the ingenuity of conveyancers to devise means for preventing such results, and to preserve the settled property at once from voluntary alienation, in which the husband's influence might be exercised preju-

(*a*) *Hodgson* v. *Williamson*, 15 Ch. D. 87.

(*b*) *Francis* v. *Wigzell*, 1 Madd. 264; *Picard* v. *Hine*, 5 Ch. 274; *Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43; *Robinson* v. *Lynes*, (1894) 2 Q. B. 577; 63 L. J. Q. B. 759.

(*c*) 45 & 46 Vict. c. 75, s. 1; *Turnbull* v. *Forman*, 15 Q. B. D. 234; 54 L. J. Q. B. 489; *Hood-Barrs* v. *Cathcart*, (1894) 2 Q. B. 559; 63 L. J. Q. B. 602.

(*d*) *King* v. *Lucas*, 23 Ch. D. 712; 53 L. J. Ch. 64; *Re Vardon's Trusts*, 31 Ch. D. 275; 55 L. J. Ch. 259.

(*e*) *Owens* v. *Dickenson*, Cr. & Ph. 48; 45 & 46 Vict. c. 75, s. 23. See *inf.*, p. 558.

(*f*) *Surman* v. *Wharton*, (1891) 1 Q. B. 491; 60 L. J. Q. B. 233.

dicially to the wife's interest, and from liability to destruction through the wife's improvidence. To this end a clause was framed to the effect that the wife should not have power to alienate the property, or to anticipate the enjoyment of the income thereof (*g*). The only question was whether this direction would be sustained in equity. Such a clause would certainly have no effect in a limitation of property to a man or to an unmarried woman (*h*), from whom the *jus disponendi* cannot be taken away by a mere prohibition; but when the matter came before the Courts, the case of a married woman's separate estate was held to be distinguishable, and restraint on anticipation was deemed just and reasonable, inasmuch as it tended to further the object for which separate estate was first created (*i*). The clause is accordingly valid and efficacious in a settlement or a devise to a married woman, whether the property in question be real or personal estate, whether limited in fee or absolutely, or for life only (*k*). Since the passing of the Acts of 1882 and 1893 (*kk*), it has been held that the restraint on anticipation, though originally an incident of equitable separate estate only, may effectually be annexed to property which is separate estate only by virtue of the Act (*l*). But there can be no restraint where there is no separate estate either equitable or statutory (*m*). A protection order under sect. 21 of the Divorce Act does not remove the restraint on anticipation (*n*).

How effected.

1. *What words will restrain anticipation.*

No particular form of words needed.

As in the case of separate use, no particular form of words is necessary to restrain alienation if the intention be clear. In addition to the common forms of expression,

(*g*) *Pybus* v. *Smith*, 3 Bro. C. C. 339.

(*h*) *Brandon* v. *Robinson*, 18 Ves. 429.

(*i*) *Tullett* v. *Armstrong*, 1 Beav. 22.

(*k*) *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627; *Re Sykes' Trusts*, 2 J. & H. 415.

(*kk*) 56 & 57 Vict. c. 63.

(*l*) *Re Lumley*, *Exp. Hood-Barrs*, (1896) 2 Ch. 690; 65 L. J. Ch. 837.

(*m*) *Stogden* v. *Lee*, (1891) 1 Q. B. 661; 60 L. J. Q. B. 669.

(*n*) *Hall* v. *Cooper*, (1893) 2 Q. B. 85; 62 L. J. Q. B. 423.

which are equivalent, with the addition of more or less conventional verbiage, to the clear words "without power of anticipation," it has been held that effectual restraint is imposed by a direction that a trustee shall during the lady's life receive the income "when and as often as the same shall become due," and pay it as she shall appoint, or permit her to receive it to her separate use, and that her receipts, or the receipts of any person to whom she may appoint the same after it shall become due, shall be valid discharges for it (*o*). So, also, if the property is not to be sold or mortgaged" (*p*), or if it is declared that the wife shall "not sell, charge, mortgage, or encumber it," though this may be followed by a declaration that she should take it to her own sole and separate use and benefit and disposal, and have the sole management thereof (*q*). It is not necessary that negative words should be introduced in the receipt clause; this must be construed to relate to the income, subject to such restraints as are imposed in the words of limitation (*r*).

Expressions insufficient.

On the other hand, the following expressions have been considered insufficient to show a clear intention to restrain anticipation: Where there has been a bequest of stock for the separate use of a wife for life, with a direction that it should "remain during her life and be under the orders of the trustees made a duly administered provision for her, and the interest given to her *on her personal appearance and receipt*" (*s*); and where the wife is to receive separate property "with her own hands from time to time," or "so that her receipts alone for what shall be actually paid into her own proper hands shall be good discharges" (*t*). In short, words which amount only to an amplification of the sense embodied in the expression "separate use" will not

(*o*) *Field* v. *Evans*, 15 Sim. 375; *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Chapman* v. *Wood*, 51 L. T. R. 501.

(*p*) *Steedman* v. *Poole*, 6 Ha. 193; *Re Hutchings to Burt*, 58 L. T. 6.

(*q*) *Baggett* v. *Meux*, *sup.*

(*r*) *Harrop* v. *Howard*, 3 Ha. 624.

(*s*) *In re Ross's Trust*, 1 Sim. N. S. 196.

(*t*) *Parkes* v. *White*, 11 Ves. 222; *Acton* v. *White*, 1 S. & S. 429.

add to the force of that expression by effecting a restraint on anticipation (*u*). Where, again, it was provided in a gift to a wife for her separate use for life, and after her decease to her appointees, that "in case any appointment "should be made by deed, the same should not come into "operation until after her death," it was held that there was no restraint on anticipation, and that she might appoint the fund by an irrevocable deed (*x*).

The question of restraint or no restraint wholly depends on the intention expressed in the instrument by which the property is settled. The fact that the property in question bears income is of weight in determining what the intention is, but this is not the essential point of inquiry (*y*).

Must conform to rule against perpetuities.

It must be carefully observed that a clause restraining anticipation will be invalid if its effect would be to transgress the rule as to perpetuities (*z*).

It was also held that in a bequest to persons in *esse* for life with remainder to their unborn children, with a general direction that the females should take for their separate and inalienable use, the restriction was void on the ground of its remoteness (*a*).

2. *The effects of restraint upon anticipation.*

Restraint renewed on second marriage.

It has already been observed that property in the hands of a *feme sole* cannot be made inalienable. The question, therefore, has arisen whether, when on the death of the husband of a married woman so restrained the restraint was discharged, it attached again on the occasion of a second marriage. This was decided in the affirmative in

(*u*) *Pybus* v. *Smith*, 1 Ves. jr. 189; 3 Bro. C. C. 340.

(*x*) *Alexander* v. *Young*, 6 Ha. 393.

(*y*) *Re Bown, O'Halloran* v. *King*, 27 Ch. D. 411; 53 L. J. Ch. 881; see *Re Ellis' Tr.*, 17 Eq. 409; *Re Croughton's Tr.*, 8 Ch. D. 460; 47 L. J. Ch. 705; *Acason* v. *Greenwood*, 34 Ch. D. 85, 712; 56 L. J. Ch. 511; *Re Tippett's and Newbould's Contr.*, 37 Ch. D. 444.

(*z*) *Fry* v. *Capper*, Kay, 163; *In re Teague's Settlement*, 10 Eq. 564; which were reluctantly followed in *In re Ridley*, 11 Ch. D. 645; *Cooper* v. *Laroche*, 16 Ch. D. 368; and see *Whitby* v. *Mitchell*, 44 Ch. D. 85; 59 L. J. Ch. 8, 485.

(*a*) *Armitage* v. *Coates*, 35 Beav. 1.

Tullett v. *Armstrong* (*b*). From that case the state of the law may be deduced as follows: If the gift be made for her sole and separate use, without more, she has, during the coverture, an alienable estate, independent of her husband. If, in addition to the limitation to her separate use, there is a restraint on anticipation, she has during the coverture the present enjoyment of an inalienable estate independent of her husband. In either case, she has when discovert a power of alienation, since the restraint on anticipation is incident only to separate estate, and there can be no such thing as separate estate apart from coverture. But the restriction being a modification of the separate estate is inseparable from it, and it accordingly again comes into operation when, on a second coverture, the property again becomes separate estate (*c*). *Tullett* v. *Armstrong*.

This being the case, the question often arises, in cases where the woman has while discovert aliened the property, and replaced it by other property, or otherwise dealt with it so as to alter its condition, whether such acts do not effectually discharge the property from all conditions, so that she in future holds it, whether sole or covert, discharged from all trust or restraint. The answer to this inquiry depends on circumstances. Substitution of other property.

If the property remains during the time of the discoverture, and until a second coverture, in the hands of trustees *in statu quo*, no question arises. If even there be no trustees, and the property has not in the interim been dealt with, upon her subsequent marriage the separate use and the restriction attached revive (*d*). If, on the other hand, property vested in trustees has been sold during the discoverture at the woman's request, and the proceeds handed to her, the identity of the settled estate or fund is clearly gone, and accordingly the separate use, with When substituted property under restraint, and when not.

(*b*) 1 Beav. 1.
(*c*) See also *Woodmeston* v. *Walker*, 2 R. & My. 197; *Hawkes* v. *Hubback*, 11 Eq. 5.
(*d*) *Newlands* v. *Paynter*, 4 My. & Cr. 408.

all its incidents, completely ceases (*e*). Or if even the property is converted by means other than sale into property of a different kind, the trust ceases, and with it all the conditions thereof (*f*). The test question as to the continuance of the separate use and restraint on anticipation is whether the property can be identified, or whether it has lost its individuality in the meanwhile by the woman's dealing with it.

Separate use, &c., may be confined to one coverture.

It is, of course, quite possible to confine the trust for the separate use of a married woman to a particular coverture (*g*), but this will not be presumed when the words employed indicate an intention that it should continue during her life (*h*).

General effects of restraint.

A clause restraining anticipation will effectually prevent a married woman from alienating or charging any part of the *corpus* of the settled estate or fund during the coverture. As to arrears of income, after some conflict of authority it seems settled that a judgment can be enforced against any income accrued due, but not actually received, at the date of the judgment, but not against income accrued after the judgment (*i*), and the same principle applies to voluntary alienation.

The clause is equally efficacious to prevent an involuntary alienation by operation of law of the *corpus* or the future income of a fund, during the coverture. Thus not even for her fraud is such property chargeable (*k*). *A fortiori* it will not be liable for her debts or general engagements incurred during coverture (*l*). The only

(*e*) *Wright* v. *W.*, 2 J. & H. 655.

(*f*) *Ibid.*; *Buttanshaw* v. *Martin*, Johns. 89.

(*g*) *Moore* v. *Morris*, 4 Drew. 33.

(*h*) *Gaffee's Sett.*, 1 Mac. & G. 541; *Hawkes* v. *Hubback*, 11 Eq. 5.

(*i*) *Hood-Barrs* v. *Heriot*, (1896) A. C. 174; 65 L. J. Q. B. 352; see *Loftus* v. *Heriot*, (1895) 2 Q. B. 212; (1896) A. C. 174; *Whiteley* v. *Edwards*, (1896) 2 Q. B. 48; 65 L. J. Q. B. 457; *Barnett* v. *Howard*, (1900) 2 Q. B. 784; 69 L. J. Q. B. 955.

(*k*) *Clive* v. *Carew*, 1 J. & H. 199; *Arnold* v. *Woodhams*, 16 Eq. 29.

(*l*) *Fitzgibbon* v. *Blake*, 3 Ir. Ch. Rep. 528; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; 50 L. J. Ch. 394; *Re Pellew*, 14 Q. B. D. 973.

charges which can affect a fund so restricted are debts contracted before marriage (*m*), and the costs properly incurred by the trustees in the administration of the trust (*n*).

Restraint could not until recently be dispensed with even by the Court.

So strictly was the restraint on anticipation regarded, that it could not, until recently, be dispensed with by a Court of equity, even where it was manifestly for the benefit of the married woman to do so, as where she was put to her election between her settled property and a bequest of much greater value (*o*), or where there was a moral obligation for her to resort to such income (*p*). But now, by 44 & 45 Vict. c. 41, s. 39, the Court is empowered, with her consent, to bind her interest, where it appears to be for her benefit, notwithstanding the restraint. Under this power the Court has released the restraint so as to provide for the payment of pressing creditors (*q*); but the Court has no general power to dispense with the restraint on the mere request of a married woman (*r*). The exercise of the power is entirely discretionary, and it is only applied where the benefit to the married woman is established (*s*). It may be exercised wholly or in part, and subject to any conditions the Court may think fit to impose (*t*). Mere increase of income is not a sufficient benefit to justify the removal of the restraint (*u*). By the Settled Land Act of 1882, it is provided that a mar-

(*m*) *Sanger* v. *S.*, 11 Eq. 470; *London and Prov. Bank* v. *Bogle*, 7 Ch. D. 773.

(*n*) *D'Oechsner* v. *Scott*, 24 Beav. 239; *In re Keane*, 12 Eq. 115.

(*o*) *Robinson* v. *Wheelwright*, 21 Beav. 214; 6 De G. M. & G. 535; *Gaskell's Trusts*, 11 Jur. N. S. 780.

(*p*) *Ellis* v. *Johnson*, 31 Ch. D. 532; 55 L. J. Ch. 325; *Cox* v. *Bennett*, (1891) 1 Ch. 617; 60 L. J. Ch. 651; but see now 56 & 57 Vict. c. 63 (*infra*, p. 439); *Bolton* v. *Curre*, (1895) 1 Ch. 544; 64 L. J. Ch. 164.

(*q*) *Hodges* v. *H.*, 20 Ch. D. 749; 51 L. J. Ch. 549; *Re Little's Will*, 36 Ch. D. 701; 56 L. J. Ch. 872.

(*r*) *Re Warren's Settlement*, 52 L. J. Ch. 928.

(*s*) See *Re Pollard's Settlement*, (1896) 1 Ch. 901; 2 Ch. 552; 65 L. J. Ch. 796; *Harrison* v. *H.*, 40 Ch. D. 418.

(*t*) *Re Milner's Settlement*, (1891) 3 Ch. 547; 61 L. J. Ch. 84; *Paget* v. *P.*, (1898) 1 Ch. 47; 67 L. J. Ch. 266.

(*u*) *Re Blundell*, (1901) 2 Ch. 221; 70 L. J. Ch. 522.

ried woman may exercise her powers under the Act notwithstanding a restraint on anticipation (*x*).

Acquiescence and compromise.

It appears that the clause restraining anticipation does not exempt a married woman from the consequences of lapse of time and acquiescence (*y*), nor prevent her from binding herself by a compromise with her trustees (*z*), but any such arrangement must, in order to be effective, be made with full knowledge of the facts (*a*).

Pin-money.

Pin-money.

Analogous to separate estate, but in some respects requiring separate consideration, is what is termed the pin-money of the wife. It has, indeed, been said to be impossible precisely to express the distinction between pin-money and separate estate (*b*).

Definition.

Pin-money may, however, be sufficiently described as an allowance settled upon a wife before marriage for the purpose of her separate personal expenditure. It is designed to defray her personal expenses, and to purchase dress and ornaments suitable to her husband's rank, so that it shall not be necessary for these purposes that she should be continually applying to her husband for money. Gifts and payments of money made for the same purposes by the husband during the coverture, are also considered as pin-money.

Almost the only questions respecting pin-money which come under judicial notice are those connected with claims for payment of arrears after a husband's death. The rules respecting such claims sufficiently distinguish pin-money from ordinary separate estate.

Arrears, how

As a rule, when a wife permits her pin-money to run

(*x*) 45 & 46 Vict. c. 38, s. 61, sub-s. 6.

(*y*) *Derbishire* v. *Home*, 3 De G. M. & G. 80.

(*z*) *Wilton* v. *Hill*, 25 L. J. Ch. 156.

(*a*) *Bateman* v. *Faber*, (1897) 2 Ch. 223; (1898) 1 Ch. 144; 67 L. J. Ch. 130.

(*b*) *Howard* v. *Digby*, 8 Bli. N. R. 259.

considerably in arrear, she cannot on the death of her husband claim payment for more than one year prior to his death (*c*). The income of her separate estate she may save or spend as she pleases; but the purpose for which pin-money is provided is for expenditure as may be necessary; and if not required, if, for instance, the husband chooses to defray the expenses which would fairly come within it, the wife has no right to accumulate it. If, indeed, the husband has actually paid for all the wife's apparel, and provided for all her private expenses, it has been held that her pin-money is thereby satisfied, and that she cannot claim any arrears at all at his death (*d*). Again, pin-money being required only for the wife personally, her executors have no right to claim any arrears (*d*).

far recoverable.

No right to accumulate.

The only case in which more than one year's arrears has been allowed was where it appeared that the wife had complained of short payments of the money, and her husband had promised that she should have it at last. There she was held entitled to all the arrears due at her husband's death (*e*).

Paraphernalia.

Such apparel and ornaments of a wife as are suitable to her condition in life, such as jewels, &c., given to her to be worn on her person, are called her paraphernalia (*f*). The family jewels of the husband, though worn by the wife, are not included, unless she acquires them as such by gift or bequest (*g*). As to gifts of jewels by a husband to his wife after marriage, it apparently depends on the intention whether they shall be deemed paraphernalia or separate estate. If given only for the express purpose of her wearing them, they are paraphernalia (*h*); if given to

Paraphernalia defined.

(*c*) *Aston* v. *A.*, 1 Ves. sr. 267; *Townshend* v. *Windham*, 2 Ves. sr. 7.

(*d*) *Thomas* v. *Bennett*, 2 P. Wms. 341; *Howard* v. *Digby*, *sup.*

(*e*) *Rideout* v. *Lewis*, 1 Atk. 269.

(*f*) *Graham* v. *Londonderry*, 3 Atk. 394.

(*g*) *Jervoise* v. *J.*, 17 Beav. 570.

(*h*) *Ibid.*

her absolutely, they become separate property (*i*). Such articles given by a person other than the husband are usually deemed to constitute separate property (*k*). The law as to paraphernalia has not been affected by the Married Women's Property Acts (*l*).

Husband's power over paraphernalia.

During the life of the husband and wife, the husband may dispose of the wife's paraphernalia either by sale or gift *inter vivos*; but he cannot dispose of them by will (*m*). If, however, he purports to do so, and by the same will confers other benefits upon his wife, she will be put to her election between her paraphernalia and such benefits (*n*). The wife has no power to dispose of her paraphernalia, either by gift or will, during the husband's lifetime (*o*).

Liability to husband's debts.

The paraphernalia are liable to the debts of the husband (*p*), but in the administration of the assets of a deceased husband, his widow's claim to paraphernalia is preferred to the general legacies (*q*). She is, therefore, entitled to marshal the assets in her favour in all cases in which a general legatee can do so (*r*). Where, moreover, the husband in his lifetime has not alienated but has merely pledged his wife's paraphernalia, on his death she is entitled to have them redeemed, if the estate be sufficient, even to the prejudice of his legatees; her claim being higher than that of pure volunteers (*s*).

(*i*) *Graham* v. *Londonderry*, 3 Atk. 394; *Grant* v. *G.*, 13 W. R. 1057; *Williams* v. *Mercier*, 10 App. Cas. 1; 9 Q. B. D. 337; 51 L. J. Q. B. 694.

(*k*) *Lucas* v. *L.*, 1 Atk. 270.

(*l*) *Tasker* v. *T.*, (1895) P. 1; 64 L. J. P. D. & A. 36.

(*m*) *Seymore* v. *Tresilian*, 3 Atk. 358.

(*n*) *Churchill* v. *Small*, 2 Kenyon, pt. 2, p. 6.

(*o*) 1 Bright. H. & W. 287.

(*p*) *Campion* v. *Cotton*, 17 Ves. 273.

(*q*) *Tipping* v. *T.*, 1 P. Wms. 729.

(*r*) See *inf.*, p. 584.

(*s*) *Graham* v. *Londonderry*, *sup.*

II. *The Equity to a Settlement.*

The second of the important principles by which equity modified the doctrines of common law respecting the status of married women, is that known as the wife's equity to a settlement.

How far obsolete.

It has already been stated that, owing to the provisions of the Act of 1882, this doctrine has all but become obsolete. That this is so is apparent from sects. 2 and 5 of the said statute. By the former section it is enacted that every woman who marries after the commencement of this Act (1 January, 1883), shall be entitled to hold as her separate property and to dispose of all real and personal property which shall belong to her at the time of the marriage, or shall be acquired by or devolve upon her after marriage. It follows that as to all women married after the date named the doctrine in question has no application, since as to them, no longer will the husband take any interest in his wife's property, whether belonging to her at the date of the marriage or accruing afterwards.

Further, by sect. 5 it is enacted that every woman married before the commencement of the Act shall be entitled to hold and dispose of as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of the Act. Thus, the Act has no retrospective effect so as to interfere with the marital rights of a husband already accrued; but, in this respect, differing from the Act of 1870, it does not save the rights of husbands already married respecting property henceforth accruing to the wife. The result is that for the future the only application of the doctrine of an equity to a settlement is to reversionary interests which were *vested* in women married before the

1st of January, 1883, but which fall into possession after that date (*t*).

Under these circumstances a brief exposition will suffice of a principle which, in the course of a few years, will have ceased to have anything more than an historical interest.

Settlement as against husband when plaintiff.

Originating in the familiar maxim that "*he who seeks equity must do equity*," the doctrine by which Courts of equity decreed, as against a husband, a settlement of such property as he received in his wife's right was at first only applied in cases in which it was necessary for the husband to seek the assistance of the Court in order to obtain possession of the wife's property.

Against assignees of insolvent husband.

But the jurisdiction which was thus first exercised only when the husband came before the Court as a plaintiff, did not long remain so confined. The next step in its development was its application against the assignees of a bankrupt or insolvent husband, or under a general assignment for the payment of his debts; these being held entitled to relief only on the same terms on which it would have been granted to the husband himself (*u*).

Against purchaser.

Then, on the ground that it was absurd to allow a husband by an assignment for valuable consideration to put the assignee in a better position than himself, and thus indirectly to defeat the equity of the wife, the Court maintained the same doctrine in suits by purchasers (*x*) and mortgagees (*y*).

Settlement at the suit of the wife.

Lastly, we come to the full development of the principle in the leading case of *Elibank* v. *Montolieu* (*z*), in which a wife was permitted to assert her right in equity as a plaintiff without the necessity of waiting until her husband might need the aid of the Court.

(*t*) *Reid* v. *R.*, 31 Ch. D. 401; 55 L. J. Ch. 756; overruling *Baynton* v. *Collins*, 27 Ch. D. 604; 53 L. J. Ch. 112; and *Re Thompson and Curzon*, 29 Ch. D. 177; 54 L. J. Ch. 610.

(*u*) *Oswell* v. *Probert*, 2 Ves. jr. 680; *Jewson* v. *Moulson*, 2 Atk. 417, 420.

(*x*) *Macaulay* v. *Philips*, 4 Ves. 15, 19.

(*y*) *Scott* v. *Spashet*, 3 Mac. & G. 599.

(*z*) 5 Ves. 737; and see *Robinson* v. *R.*, 12 Ch. D. 188.

1. *The nature of the right.*

The right to assert or to waive the equity to a settlement rests solely with the married woman, but this notwithstanding, the right may not as a rule be insisted upon by her for her exclusive benefit. When, from the nature of the estate or fund in question, provision can at the same time be made for her children, this is invariably done. Her equity and the equity of the children are treated as one equity, and if asserted, it must be asserted for their common benefit (*a*). Equity to a settlement includes children.

The consequence of the right being personal to her is, that if she dies without having taken any steps to claim it, the children cannot set up a claim (*b*). And further, the wife may, at any time before the settlement is completed, waive her right to it, and thus defeat the interest of her children (*c*). But if, as in the case of *Murray* v. *Elibank* (*d*), a decree of reference has been made to approve a proper settlement, and then the wife dies without having waived it, the children are entitled to the benefit of the decree, even though they may not have been mentioned therein (*e*). She may waive it.

The making of the decree marks the exact point at which the right of the children attaches. The fact that proceedings have been commenced by the wife to secure a settlement is not sufficient (*f*). Still less would notice given by her to trustees in whom the fund was vested avail (*g*). But the right of the children will attach when the wife has entered into a contract with her husband or with her husband's assignees for a settlement of her property (*h*). Children's right attaches on decree, or on contract for settlement.

(*a*) *Johnson* v. *J.*, 1 J. & W. 472, 479.

(*b*) *Scriven* v. *Tapley*, 2 Eden, 337.

(*c*) *Hodgens* v. *H.*, 11 Bli. N. S. 104; *Lloyd* v. *Williams*, 1 Madd. 450, 467.

(*d*) 10 Ves. 84; 13 *ib.* 1.

(*e*) *Rowe* v. *Jackson*, Dick. 604; *Groves* v. *Perkins*, 6 Sim. 584; 1 Kee. 132.

(*f*) *De la Garde* v. *Lempriere*, 6 Beav. 344; *Lloyd* v. *Mason*, 5 Ha. 149.

(*g*) *Wallace* v. *Auldjo*, 2 Dr. & S. 216, 222.

(*h*) *Lloyd* v. *Williams*, *sup.*

Where, therefore, such a decree has been made or contract entered into, the children have a vested right to a provision, which is, however, liable to be divested by a waiver of the right by the wife (*i*); but her death without waiver will not prejudice it. This position continues until the execution of the settlement decreed or agreed upon; from which time the right of the children becomes indefeasible, the wife having no longer the power to waive it (*k*).

Having already seen that a married woman's equity to a settlement may now be generally asserted by her as against her husband and his assignees, whether in bankruptcy or for valuable consideration, the next consideration is as to what property is affected by her right.

2. *Out of what property a settlement can be claimed.*

In the consideration of the different species of property affected by a wife's equity to a settlement, we shall be assisted by first observing two general principles respecting the doctrine.

The equity only attaches to what husband takes in wife's right.

(1.) The equity to a settlement does not attach on what a wife takes in her own right, but upon what the husband takes in right of the wife. Thus, if property descends upon a married woman as tenant in tail, whatever her right to a provision out of the income, which her husband would at law be entitled to receive, she would have and would need no equity to a settlement out of the *corpus*, to which the law gave him no claim in right of his wife (*l*).

It only attaches on the right to receive the property.

(2.) The equity to a settlement attaches not on the property itself, but on the right to receive it; that is to say, it only arises on the husband's legal right to present possession. Thus, a wife cannot claim a settlement out of a reversionary interest in property as long as it continues reversionary (*m*).

(*i*) *Fenner* v. *Taylor*, 2 Russ. & M. 190.

(*k*) *Barker* v. *Lea*, 6 Madd. 330.

(*l*) *Life Assoc. of Scotland* v. *Siddal*, 3 De G. F. & J. 271; *Re Cumming*, 2 *ib.* 376.

(*m*) *Osborn* v. *Morgan*, 9 Ha. 434.

Bearing in mind these general principles, we shall the more easily follow the classification of those species of property subject to the obligation of a settlement.

Generally only equitable estates considered,

From the nature of the case it is evident that we have as a rule only to deal with equitable estates and interests. Such property as the husband could recover at law without the assistance of a Court of equity is unaffected by a doctrine which took its rise merely in the form of a condition imposed by equity on the granting of its assistance (*n*). And though by the Judicature Act (*o*) equitable estates and interests are now recognisable in Courts of law, this makes no difference, inasmuch as, by the same authority, the wife's equity would likewise be enforceable there. If, however, the property, though in its nature legal, becomes from collateral circumstances the subject of a suit in equity, it was held in the important case of *Sturgis* v. *Champneys* (*p*) that the wife's equity attached; Lord Cottenham considering that whatever cause brought the parties before the Court brought them within the operation of the maxim, "*That he who seeks equity must do equity*" (*q*). Thus, also, where a married woman was legal tenant in tail in possession of an estate which was subject to an equitable term of years to secure a jointure, the existence of the term was considered sufficient to entitle the wife to claim a settlement, the title to the rents being equitable as long as the term lasted (*r*).

though legal property, if subject to suit, is liable.

Equitable choses in action and estates fee or tail.

The equity to a settlement, then, clearly attaches upon equitable choses in action to which the husband becomes entitled in the right of his wife (*s*). Though in some circumstances a settlement for life may be made out of an equitable estate of inheritance, equity will not interfere

(*n*) But see *Ruffles* v. *Alston*, 19 Eq. 539, 546.

(*o*) 36 & 37 Vict. c. 66.

(*p*) 5 My. & Cr. 97; and see *Gleaves* v. *Paine*, 1 De G. J. & S. 87.

(*q*) See also *Oswell* v. *Probert*, 2 Ves. jr. 680.

(*r*) *Wortham* v. *Pemberton*, 1 De G. & Sm. 644.

(*s*) *Burdon* v. *Dean*, 2 Ves. jr. 607; *Smith* v. *Matthews*, 3 De G. F. & J. 139.

with the possible estate by curtesy of the husband (*t*). The fact, moreover, of a legacy being charged upon land, with a power of entry and receipt of the rents and profits, does not so deprive it of its equitable character as to interfere with the wife's right (*u*).

Leaseholds legal,

Where a husband in the right of his wife becomes entitled to a legal interest in leaseholds, the wife cannot claim a settlement thereout, and the husband can effectually

equitable.

dispose of them by sale or mortgage (*x*). But if the legal estate of leaseholds is in a trustee for the wife, it is now clearly decided that any disposition the husband may make is subject to his wife's equity (*y*).

Life interests when subject to settlement.

Where the interest of the married woman is for life only, it depends on circumstances whether she can claim a settlement thereout. It is clear that if the husband has deserted his wife, or if he fails through insolvency to provide for her, equity will settle the fund on her as against her husband, and also as against anyone claiming under him by virtue of an assignment for value made subsequently to the bankruptcy (*z*); therefore, *à fortiori*, as against his trustee in bankruptcy (*a*).

It is also clear that if the husband is living with and maintaining his wife, she cannot claim a settlement out of a life interest against a particular assignee for value of her husband (*b*); and if such an assignment has been made, it cannot afterwards be disturbed by any subsequent misconduct of the husband in not maintaining her, or by his subsequent bankruptcy (*c*). And further, the right cannot under the same circumstances be asserted as against the

(*t*) *Smith* v. *Matthews*, 3 De G. F. & J. 139.

(*u*) *Duncombe* v. *Greenacre*, 28 Beav. 472; 2 De G. F. & J. 509.

(*x*) *Hatchell* v. *Eggleso*, 1 Ir. Ch. 215; *Hill* v. *Edmonds*, 5 De G. & S. 603.

(*y*) *Hanson* v. *Keating*, 4 Ha. 1.

(*z*) *Sturgis* v. *Champneys*, 5 My. & Cr. 97; *Wright* v. *Morley*, 11 Ves. 12; *Elliott* v. *Cordell*, 5 Mad. 149; *Boxall* v. *B.*, 27 Ch. D. 220; 53 L. J. Ch. 838.

(*a*) *Lumb* v. *Milnes*, 5 Ves. 517; *Taunton* v. *Morris*, 8 Ch. D. 453; 11 *ib.* 779.

(*b*) *Tidd* v. *Lister*, 3 De G. M. & G. 857, 869.

(*c*) *Ibid.* 870; *Re Carr's Tr.*, 12 Eq. 609; *Elliott* v. *Cordell*, *sup.*

husband himself. From the nature of the case the children could not participate in the settlement, and, as between husband and wife, as long as he performs his duty, he is entitled to his legal rights (*d*).

Arrears of income.

It is clear, moreover, that a wife is not entitled to any settlement out of arrears of income accruing due before she has set up any claim thereto. Such income will be paid to her husband or his assignees (*e*).

3. *Waiver of settlement.*

When there cannot be waiver.

Infant.

Ward of Court.

We have seen that, as a general rule, it is within the option of a married woman to bar her own equity and that of her children by waiving her right to a settlement. But it is not in all cases and at all times open to a married woman to waive her right. Thus, she cannot do so during infancy (*f*). A female ward of Court married without its authority cannot consent (*g*), except, perhaps, where the marriage has been with the consent of her guardian (*h*).

Fund must be ascertained.

Further, consent will not be taken until the amount of the fund in question is ascertained (*i*); nor will it be binding if it has been made under the influence of mistake (*k*).

Consent to waive may be retracted.

Notwithstanding that consent has been given, it may be retracted at any time before the payment to the husband is made, or the transfer completed (*l*); and, apart from that, the Court has power to postpone in its discretion the payment or transfer (*m*).

4. *What circumstances will bar the equity to a settlement.*

Not merely may a married woman deprive herself of her

(*d*) *Vaughan* v. *Buck*, 13 Sim. 404.

(*e*) *Newman* v. *Wilson*, 31 Beav. 34; *In re Carr's Tr.*, *sup.*

(*f*) *Stubbs* v. *Sargon*, 2 Beav. 496; *Shipway* v. *Ball*, 16 Ch. D. 376.

(*g*) *Stackpoole* v. *Beaumont*, 3 Ves. 89.

(*h*) *Bennett* v. *Biddles*, 10 Jur. 534.

(*i*) *Edmunds* v. *Townshend*, 1 Anst. 93.

(*k*) *Watson* v. *Marshall*, 17 Beav. 363.

(*l*) *Penfold* v. *Mould*, 4 Eq. 562.

(*m*) *Wright* v. *Rutter*, 2 Ves. 673, 677.

equity to a settlement by a voluntary waiver, but there are many circumstances, apart from such consent, which will effectually prevent her assertion of the right. Thus,—

Reduction into possession.

(1.) Where the property, whether *corpus* or income, has once come to the hands of the husband or his assignee, the wife can no longer claim her equity. And no transfer or payment so made by a trustee before action brought can be afterwards disturbed (*n*).

Wife insolvent.

(2.) When a woman, at the time of her marriage, owes more than the whole amount of her property, she has no equity to a settlement out of it (*o*). But the mere fact of her having been indebted at that time would not prevent her claiming a settlement out of so much of the fund as remained after making provision for the payment of the debts (*p*). Her equity is not wholly defeated by the fact that her husband is indebted to the estate to an amount exceeding the wife's interest (*q*).

Adequate settlement already made.

(3.) If an adequate settlement has already been made upon her, the wife's equity to a settlement is thereby barred for the future (*r*). It may also be barred by an express stipulation to that effect made before marriage, even though the settlement were inadequate (*s*). If the original settlement is adequate, it is not essential that it should have been made by the husband (*t*).

Alienation by the wife.

(4.) The equity to a settlement may be lost by the alienation by the wife of the property concerned. It is necessary, therefore, here to consider by what means such alienation may be effected. But it must be carefully observed that the following matter under this head applies only to the very limited number of cases in which the interest in question vested, prior to 1st January, 1883, in a

(*n*) *Milner* v. *Colmer*, 2 P. Wms. 639, 641; *Allday* v. *Fletcher*, 1 De G. & J. 82.

(*o*) *Bonner* v. *B.*, 17 Beav. 86.

(*p*) *Barnard* v. *Ford*, 4 Ch. 247.

(*q*) *Poulter* v. *Shackel*, 39 Ch. D. 471; 57 L. J. Ch. 953; *Knight* v. *K.*, 18 Eq. 487.

(*r*) *In re Erskine's Tr.*, 1 K. & J. 302.

(*s*) *Salway* v. *S.*, Amb. 692; *Garforth* v. *Bradley*, 2 Ves. sr. 675.

(*t*) *Giacometti* v. *Prodgers*, 8 Ch. 338.

woman married prior to that date. In all other cases, a married woman has, by virtue of the Act of 1882 (*u*), the same power of disposition as a *feme sole*.

As to realty. 3 & 4 Will. IV. c. 74; 8 & 9 Vict. c. 106.

(i.) As to realty. By virtue of the Fines and Recoveries Act (*x*), and the Real Property Amendment Act (*y*), a married woman might dispose of her estates of freehold, and also release or assign any sum of money charged on lands, or the produce of land directed to be sold, by a deed duly acknowledged by her, after separate examination before a judge or a commissioner, and made with the concurrence of her husband (*z*). This applies to interests in reversion as well as to those in possession (*a*); but her interest must, at the date of the disposing deed, rest on an existing title, legal or equitable. A mere expectation is not within the statutes (*b*).

She might also dispose of her copyholds by surrender, jointly with her husband, on being separately examined by the steward or his deputy.

(ii.) As to personalty.

Personalty.

A married woman's personal estate, as we have seen, vests in her husband on the marriage. During the marriage, therefore, she has no power of disposition over it, except in case of property or powers falling within 20 & 21 Vict. c. 57, presently mentioned. If her husband reduces her choses in action into possession they become his. If not, and his wife survives him, she will be entitled to them.

20 & 21 Vict. c. 57.

By 20 & 21 Vict. c. 57 (commonly known as Malins' Act), it was enacted that, after the 31st of December, 1857, it should be lawful for a married woman (not restrained from anticipation) to release or extinguish any power which might be vested in or limited to or reserved to her

(*u*) 45 & 46 Vict. c. 75, s. 1.
(*x*) 3 & 4 Will. IV. c. 74.
(*y*) 8 & 9 Vict. c. 106.
(*z*) 45 & 46 Vict. c. 39, s. 7.
(*a*) *Miller* v. *Collins*, (1896) 1 Ch. 573; 65 L. J. Ch. 353.
(*b*) *Allcard* v. *Walker*, (1896) 2 Ch. 369; 65 L. J. Ch. 660.

in regard to any personal estate, as fully and effectually as she could do if she were a *feme sole*, and also to release or extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession, under any instrument made after the 31st of December, 1857 (*c*). Her husband must, however, concur in the deed effecting this purpose, and the deed must be acknowledged in the manner prescribed by the Fines and Recoveries Act, varied by the Conveyancing Act, 1882, as above quoted.

Fraud. (5.) A married woman's equity to a settlement may be barred by her fraud; for instance, by her concealing the fact of her marriage from a purchaser (*d*).

Adultery. (6.) If a wife is living in adultery apart from her husband, her right is generally barred (*e*); but if the husband also is living in adultery, it is not so (*f*); nor if, being a ward of Court, she marries without its consent (*g*).

Moreover, it seems that, even in the absence of such circumstances, the husband will not be allowed to receive the whole of the property of a wife who is living in adultery, if he does not maintain her (*h*).

5. *Amount of the settlement.*

Where a wife has established her equity to a settlement, and the amount to be settled is not agreed upon between the husband and wife, the Court, in determining this, is guided by a consideration of the circumstances of the whole case and has a free discretion (*i*). We shall consider separately the settlement of income and the settlement of *corpus*.

(*c*) Sect. 1. See *Layborn* v. *Grover-Wright*, (1894) 1 Ch. 303; 63 L. J. Ch. 392.

(*d*) *In re Lush's Tr.*, 4 Ch. 591; but see and distinguish *Bateman* v. *Faber*, (1897) 2 Ch. 223; (1898) 1 Ch. 144; 67 L. J. Ch. 130.

(*e*) *Carr* v. *Eastabrook*, 4 Ves. 146.

(*f*) *Greedy* v. *Lavender*, 13 Beav. 62.

(*g*) *Ball* v. *Coutts*, 1 V. & B. 292, 302, 304.

(*h*) *Ball* v. *Montgomery*, 2 Ves. jr. 191.

(*i*) *Carter* v. *Taggart*, 1 De G. M. & G. 289; *Re Suggitt's Trusts*, 3 Ch. 215.

(1.) *As to income.*

As a general rule, where the husband is solvent and has been guilty of no misconduct, the Court will not interfere with his legal right, but will allow him to receive the whole income of the property. It is satisfied with retaining the capital, so as to give the wife a chance of taking it by survivorship (*k*). Husband usually takes income.

But if the husband deserts his wife and leaves her unprovided for, she is entitled to the payment of the income of her property to herself (*l*). *Secus* if he deserts her.

We have already seen that with respect to a life interest, a wife is entitled, in the case of desertion by, or the bankruptcy of, the husband, to a settlement on herself as against the husband, or his trustee in bankruptcy, or against an assignee for value, if the assignment has been made subsequent to the desertion. And it has been decided that such settlement may extend to the whole of the income (*m*). As long as the husband supports her, she cannot claim a settlement as against him, or against his assignee for value (*n*). Even in the case of a husband's insolvency, a settlement of income was refused where the wife had already an adequate provision for her separate use (*o*).

(2.) *As to capital.*

The general rule, in the absence of special circumstances, is that one half of the wife's property shall be settled upon her, and the other half go to the husband or his assignees (*p*). One half of capital the rule,

This is, however, quite a matter for the discretion of the Court, which will take into consideration the amount of the wife's fortune already received by the husband; any but subject to discretion.

(*k*) *Sleech* v. *Thorington*, 2 Ves. sr. 561; *Atcheson* v. *A.*, 11 Beav. 485.

(*l*) *Gilchrist* v. *Cator*, 1 De G. & Sm. 188; *Dunkley* v. *D.*, 4 De G. & S. 570; 2 De G. M. & G. 390.

(*m*) *Taunton* v. *Morris*, 11 Ch. D. 779; *Fowke* v. *Draycott*, 29 Ch. D. 996; 54 L. J. Ch. 977; *Reid* v. *R.*, 33 Ch. D. 220; 55 L. J. Ch. 756.

(*n*) *Sup.* p. 420.

(*o*) *Aguilar* v. *A.*, 5 Madd. 414.

(*p*) *Jewson* v. *Moulson*, 2 Atk. 417, 423; *Spirett* v. *Willows*, 1 Ch. 520; 4 Ch. 407; *Roberts* v. *Cooper*, (1891) 2 Ch. 335; 60 L. J. Ch. 377.

previous settlement which may have been made (*q*); whether the wife has received any benefit out of the husband's property (*r*); the conduct and circumstances of the husband (*s*), and the conduct of the wife (*t*).

Circumstances of influence.

Circumstances may appear under these considerations which will induce the Court to go so far as to settle the whole fund on the wife. Where the husband has already received a considerable fortune from her (*u*), where he has become insolvent and no settlement has been made (*x*), and where he has deserted or behaved cruelly to his wife (*y*), the whole fund has been settled; and the same was done where, in the absence of such circumstances, the fund was small and barely sufficient for a provision for the wife and children (*z*).

6. *Form of the settlement.*

Usual limitations.

The design of the settlement being to provide for the wife and children, the Court will, as far as possible, accomplish this, but will not interfere with the marital legal right farther than is necessary for this purpose. The usual limitations will be, therefore, as to personalty, to give the income either to the husband, or his assignee, or to the wife for life for her separate use without power of anticipation, according to the circumstances above discussed, and the *corpus* to her children after her death (*a*); if there should be no issue the ultimate remainder will, it seems, be to the husband absolutely, whether he survives the wife or not (*b*). The fact of the husband's insolvency, or his having assigned his interest, or of the wife's relations

(*q*) *Green* v. *Otte*, 1 S. & S. 250; *Napier* v. *N.*, 1 D. & W. 407.

(*r*) *In re Erskine's Tr.*, 1 K. & J. 302.

(*s*) *Coster* v. *C.*, 9 Sim. 597.

(*t*) *Giacometti* v. *Prodgers*, 14 Eq. 253; 8 Ch. 338.

(*u*) *Gardner* v. *Marshall*, 14 Sim. 575.

(*x*) *Francis* v. *Brooking*, 19 Beav. 347.

(*y*) *Dunkley* v. *D.*, 4 De G. & S. 570; *Boxall* v. *B.*, 27 Ch. D. 220.

(*z*) *In re Kincaid's Tr.*, 1 Drew. 326; 17 Jur. 106.

(*a*) *Gent* v. *Harris*, 10 Ha. 383.

(*b*) *Carter* v. *Taggart*, 1 De G. M. & G. 286; *Croxton* v. *May*, 9 Eq. 404; *Walsh* v. *Wason*, 8 Ch. 482; *Spirett* v. *Willows*, 1 Ch. 520; 4 Ch. 407.

being in humble circumstances, is not sufficient reason for deviating from this rule in favour of the wife, or her next of kin (*c*).

7. *How far the settlement binds creditors.*

Where the Court decrees a settlement upon a wife, it will be supported as a good settlement for valuable consideration (*d*). Settlement deemed on good consideration.

Further, if after marriage property accrues to the husband in right of the wife, which the husband cannot reach without the aid of the Court, and by agreement he consents to such a settlement as the Court would have ordered, this settlement will be maintained against creditors (*e*).

Even if trustees in possession of the property of a married woman should, on the mere request of her husband, transfer it to new trustees upon trust for her separate use, such trust will be good as against his creditors (*f*).

But if the husband has once reduced into possession the equitable choses in action of his wife, any subsequent settlement of them must conform to 13 Eliz. c. 5, or it will be void as against creditors (*g*). The Bankruptcy Act, 1883 (*h*), provides that a settlement made on or for the benefit of the wife or children of the settlor of property which has accrued to the settlor in right of his wife, is good against his trustee in bankruptcy.

Reduction into possession of wife's property by husband.

Having seen that a husband's right to his wife's choses in action depends upon his reducing them into possession, we are led by this case to inquire what acts amount to a reduction into possession.

1. The clearest case is of course where the husband Payment to husband.

(*c*) *Carter* v. *Taggart*, *sup.*

(*d*) *Wheeler* v. *Caryl*, Amb. 121; *Simson* v. *Jones*, 2 R. & M. 365.

(*e*) *Wheeler* v. *Caryl*, *sup.*; *In re Wray's Tr.*, 16 Jur. 1126.

(*f*) *Ryland* v. *Smith*, 1 My. & Cr. 53.

(*g*) *Ibid.*; *Goldsmith* v. *Russell*, 5 De G. M. & G. 547.

(*h*) 46 & 47 Vict. c. 52, s. 47.

actually receives payment of the sum in question—for instance, a sum due to her on a mortgage (*i*). If, however, he so receives money in the character of trustee, this will not amount to a reduction into possession (*k*).

Transfer into his name.

2. The transfer of a wife's stock into her husband's sole name, or even a transfer by his direction into the names of trustees, upon trusts inconsistent with his wife's equity, amounts to a reduction into possession (*l*). But if such transfer, or the investment of stock belonging to the wife, be effected in a manner consistent with her equities, the case will be otherwise, and her right by survivorship will remain (*m*).

Suit by husband and wife.

3. If a husband and wife together sue to recover choses in action which belonged to the wife before marriage, judgment in the action amounts to reduction into possession by the husband (*n*); though if he dies after judgment, but before execution, the judgment will survive to the wife (*o*). But if the husband sues in his own name for a chose in action accruing to his wife during the marriage, and dies after judgment, his representatives, and not the wife, will be entitled (*p*).

Receiver.

4. Where the income of a married woman's life estate had been ordered to be received and applied by a receiver in a suit in payment of her husband's incumbrances, it was held that arrears of income in the receiver's hands which had not been paid as directed were, by the effect of the order, reduced into possession (*q*).

Sale by husband.

5. A sale by a husband of his wife's choses in action, followed by the purchaser's taking possession, will amount to a reduction into possession (*r*).

General principle.

The general result is that any act which has the effect

(*i*) *Rees* v. *Keith*, 11 Sim. 388.
(*k*) *Baker* v. *Hull*, 12 Ves. 497; *Wall* v. *Tomlinson*, 16 Ves. 413.
(*l*) *Hansen* v. *Miller*, 14 Sim. 22.
(*m*) *Ryland* v. *Smith*, 1 My. & Cr. 53.
(*n*) *Sherrington* v. *Yates*, 12 M. & W. 855.
(*o*) *Bond* v. *Simmons*, 3 Atk. 21.
(*p*) *Oglander* v. *Baston*, 1 Vern. 396.
(*q*) *Tidd* v. *Lister*, 2 W. R. 184; 3 De G. M. & G. 857.
(*r*) *Widgery* v. *Tepper*, 5 Ch. D. 516.

of changing the property in the choses in action will amount to a reduction thereof into possession (*s*). But acts which do not amount to this will not suffice. Thus, there has been held to be no reduction into possession where there was a fund set apart for payment to the husband (*t*); where interest only had been paid to the husband (*u*); where the husband proved against the estate of a bankrupt indebted to his wife, but died before the declaration of a dividend (*x*). On the same principle, payment of a part of a fund only amounts to reduction into possession *pro tanto* (*y*). As to a reversionary interest, an assignment, whether particular or general, could not suffice to bar the wife's right by survivorship (*z*).

If a husband fail actually to reduce his wife's choses in action into possession during her lifetime, he will, upon her death before him, be entitled to them as her administrator, provided that he has not already made an assignment of them, which, though ineffective against her if she survived him, would be valid as against himself. If he dies without taking out letters of administration, his personal representative may become entitled by doing so (*a*).

Assignment by husband.

The rule is now well established that a husband by assigning his wife's choses in action can give no better right to another than he has himself. If the wife survives the husband, the assignee of a reversionary interest can take nothing. If the husband survives the wife, the assignee is entitled to the property (*b*).

Reversionary interests.

As to reversionary interests in particular, whether the husband after the assignment dies in the lifetime of the tenant for life, so that the chose in action cannot be reduced into possession, or whether he survives her without

(*s*) *Aitcheson* v. *Dixon*, 10 Eq. 589.
(*t*) *Blunt* v. *Bestland*, 5 Ves. 515.
(*u*) *Ibid.*; *Howman* v. *Corie*, 2 Vern. 190.
(*x*) *Anon.*, 2 Vern. 706.
(*y*) *Nash* v. *N.*, 2 Madd. 133, 139; *Scrutton* v. *Patello*, 19 Eq. 369, 373.
(*z*) *Hornsby* v. *Lee*, 2 Madd. 16.
(*a*) *In the goods of Harding*, 2 P. & D. 394.
(*b*) *Purdew* v. *Jackson*, 1 Russ. 1.

having actually reduced it into possession, the result is the same—the chose in action will survive to the wife (*c*). Moreover, a release by a husband of a reversionary chose in action of his wife is as inoperative against his wife as his assignment would be (*d*).

III. *Fraud on Marital Rights.*

Another head of equitable jurisdiction relating to married women has apparently been rendered obsolete by the provisions of the Act of 1882. As long as it was a general rule of law that on marriage a husband became entitled to the property of his wife, Courts of equity were wont to interfere to prevent a wife from committing a fraud on this right, by a secret alienation of her property during the treaty of marriage. The legal right having been destroyed by the Act of 1882, the foundation of the equitable wrong formerly relieved against no longer, it is submitted, exists, and if so, the principles which directed the Courts in the exercise of this branch of their jurisdiction have ceased to be of practical importance. But in a treatise on equity it would, perhaps, not yet be safe to ignore a doctrine which in certain conceivable circumstances may be found still to have some scope for operation.

The leading authority on the principle in question is the case of *Strathmore* v. *Bowes* (*e*), in which the principle was fully recognised that a husband may, in a proper case, come into equity, and claim its assistance against a settlement of the wife's property, which is concealed from him, pending the treaty for marriage.

The first corollary from that case is, that it is necessary for a person impeaching a settlement to prove that at the time of its execution he was the *then intended* husband.

(*c*) *Ellison* v. *Elwin*, 13 Sim. 309.
(*d*) *Rogers* v. *Acaster*, 14 Beav. 445.
(*e*) 1 Ves. sen. 22; 1 W. & T. L. C. 446.

He must show that the settlement was made during the course of the treaty for marriage with him (*f*). If this is so, and the woman during the treaty for marriage holds herself out as entitled to property, and then conveys or settles it without the knowledge or concurrence of the intended husband, actual fraud will be imputed to her, and the deed will be set aside in equity (*g*).

The principle has been carried in some cases farther than this. In *Goddard* v. *Snow* (*h*) there was no active deception of the intended husband, who was, it seems, not aware of the existence of her property. Yet a settlement of which he had not been informed was set aside after an interval of ten years, as being a fraud upon his marital right (*i*).

It has been questioned whether a meritorious consideration will suffice to support a settlement, notwithstanding concealment from an intended husband—for instance, the fact that the settlement has been made in favour of children of a former marriage. If such a settlement is made previous to a treaty for a second marriage it is doubtless good (*k*); but it seems that, if made during the treaty for marriage, the fact of there being a provision for children will not render valid a settlement which would on other grounds be fraudulent (*l*).

Valuable consideration.

A transfer for valuable consideration to a purchaser without notice of any intended derogation of the marital right will, however, be held good (*m*), and probably the purchaser's right would be sustained even if he acted with notice (*m*).

Knowledge by husband.

Moreover, if the husband knew of the gift or settlement during the treaty for marriage, although he may not have been informed of it by the intended wife, he will not be

(*f*) *England* v. *Downs*, 2 Beav. 522.
(*g*) *Ibid.*; *Lance* v. *Norman*, 2 Ch. Rep. 79.
(*h*) 1 Russ. 485.
(*i*) *Downes* v. *Jennings*, 32 Beav. 290; *Taylor* v. *Pugh*, 1 Ha. 608.
(*k*) *King* v. *Cotton*, 2 P. Wms. 674.
(*l*) *Taylor* v. *Pugh*, *sup.*
(*m*) *Blanchet* v. *Foster*, 2 Ves. sr. 264; *Llewellyn* v. *Cobbold*, 1 Sm. & G. 376.

able to set it aside (*n*); much less if he concurs in it (*o*). If, likewise, after marriage he acquiesces in or confirms the settlement, he will not be allowed to dispute it (*p*). Mere delay in seeking relief, however, will not necessarily amount to acquiescence (*q*).

Seduction.

If the husband has before marriage seduced his intended wife, and so deprived her of her liberty of action, any settlement she may have made will be sustained against him (*r*).

Limits of the principle.

In the absence of any representation made as to specific property, there is no implied contract of the lady that her property shall be in no way diminished during the treaty for marriage. It is for the Court to determine whether, having regard to the position of the parties and the circumstances of the case, the transaction should be treated as fraudulent or not (*s*).

(*n*) *St. George* v. *Wake*, 1 My. & K. 610; *Ashton* v. *MeDougall*, 5 Beav. 56.

(*o*) *Slocombe* v. *Glubb*, 2 Bro. C. C. 545.

(*p*) *Maber* v. *Hobbs*, 2 Y. & C. Ex. 317.

(*q*) *Downes* v. *Jennings*, 32 Beav. 290.

(*r*) *Taylor* v. *Pugh*, 1 Ha. 608.

(*s*) *De Mandeville* v. *Crompton*, 1 V. & B. 354; *Taylor* v. *Pugh*, *sup.*

Section II.—Married Women's Property Act, 1882.

I. *Statutory Separate Property.*
II. *Contractual Powers.*

Having now reviewed in detail the methods in which, by an application of the principles of equity, the Courts strove to mitigate some of the disabilities under which married women laboured at common law, it remains to consider the completion of this remedial process by the acts of the legislature, which have now almost placed the husband and wife on a footing of juristic equality.

Divorce Acts.

The briefest mention will suffice of the provisions under the Divorce Acts (*a*) for protecting the earnings and other property of married women who have been deserted by, or judicially separated from, their husbands, these being subjects foreign to this work. Nor is it necessary to consider in detail the tentative Married Women's Property Acts of 1870 and 1874 (*b*), which are now repealed. The former of these Acts protected from the husband's power any earnings of a wife acquired in any employment carried on separately from her husband, and secured to her as separate property any real property descending to her as heiress of an intestate during the coverture, and also personal property devolving upon her as next of kin of an intestate, and any sum of money not exceeding 200*l.* to which she became entitled under any deed or will, subject

M. W. P. Acts, 1870 and 1874.

(*a*) 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108; see also 41 Vict. c. 19; 49 & 50 Vict. c. 52; 58 & 59 Vict. c. 39.

(*b*) 33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50.

in all cases, of course, to the provisions of any settlement affecting the same (*c*). It provided also for the investments of the separate property, gave powers of the effecting of policies of insurance for the benefit of the wife, and further conferred on a married woman a right of action respecting her separate property. It also made certain provisions subsequently modified by the Act of 1874, respecting the liability of husband and wife for the ante-nuptial debts of the wife. These it may be necessary to refer to more particularly hereafter, as they remain applicable to the cases of women married prior to 1883.

M. W. P. Act, 1882.

The provisions of the Married Women's Property Act, 1882 (*d*), are so much wider than those of its predecessors that they may be described as a new body of law, consolidating and to a great extent superseding the results of the cases in equity as well as of the previous Acts (*e*).

Its provisions may be classified under two fundamental alterations which it introduces into the law respecting married women. These are—

The right to hold property.

(1.) That "a married woman shall, in accordance with "the provisions of the Act, be capable of acquiring, holding, or disposing by will or otherwise of any real or "personal property as her separate property, in the same "manner as if she were a *feme sole*, without the intervention of any trustee" (*f*).

The right to contract.

(2.) "A married woman shall be capable of entering "into and rendering herself liable in respect of and to the "extent of her separate property on any contract, and of "suing and being sued, either in contract or in tort or "otherwise, in all respects as if she were a *feme sole*" (*g*).

The remainder of the statute in the main consists of provisions for the application of the principles thus broadly expressed.

(*c*) See *Harrison* v. *Davis*, (1897) 2 Ch. 204; 66 L. J. Ch. 512.

(*d*) 45 & 46 Vict. c. 75.

(*e*) Pollock, Contr. p. 83, ed. 6.

(*f*) See *Mansfield* v. *M.*, 43 Ch. D. 12.

(*g*) Sect. 1, sub-sects. (1), (2); *Whittaker* v. *Kershaw*, 45 Ch. D. 320; 60 L. J. Ch. 9.

It is impossible here to exhaustively examine the changes in the law thus effected; but a summary of the salient features of the Act may be set out under the two heads suggested. (1.) Statutory separate property. (2.) Contractual powers. The powers conferred of suing and being sued as a *feme sole* fall under the head of procedure, and do not here require comment.

1. *Statutory separate property.*

Separate property under the Act.

It will be seen from ss. 2 and 5 of the Act that separate property thereunder is either—(1.) Property acquired by *any married woman* after 31st December, 1882, including her earnings; or (2.) Property belonging at the time of marriage to a woman marrying after that date. In other words, as to women marrying since the Act, all their property is separate property; the husband has no control over it: as to women married before the Act, all their property is their separate property, *except that the title to which accrued before the Act.* A mere *spes successionis* as one of a class of possible next of kin is not a contingent title accrued within the meaning of the section (*h*).

The effect of this exception is to protect any marital rights of a husband which accrued before the Act; and this being so, the doctrine of a wife's equity to a settlement remains operative, as has been above observed, to property falling within it. Apart then from the assertion of this equity as already described, this excepted property is liable to the husband's marital rights as before the Act. Thus a chose in action vested before 1st January, 1883, in a woman married before that date, but not reduced into possession, would be lost to the married woman if reduced to possession by the husband. His interest in such property is not a mere possibility, but a property subject to the condition that he must reduce it into possession (*i*).

(*h*) *Stockley* v. *Parsons*, 45 Ch. D. 51; 59 L. J. Ch. 666.
(*i*) *Re Biaggi*, W. N. 1882, p. 65.

As to separate property generally, it will be seen that the intervention of trustees being no longer necessary, the necessity of resorting to conveyancers in order to impress on property the character of separate estate, no longer exists. At least the legal estate need only be transferred to trustees when it is desired to impose a restraint on alienation.

Acquisition.

The manner of the acquisition of the property is immaterial. In the absence of express agreement to the contrary, all property acquired by or devolving upon a married woman will be held by her as if she were a *feme sole*. After some judicial hesitation it has, however, now been decided that a wife's separate capacity for acquiring property does not entirely efface the common law doctrine of the unity of husband and wife; and as before the Act, so now, a gift to a husband and his wife and a third person confers only one moiety upon the husband and his wife jointly (*k*).

Holding.

The enjoyment and management of separate property now pertains to a married woman independent of her husband's control. She is, it seems, even entitled to an injunction against her husband for the protection of her rights (*l*). Special provisions are contained in ss. 6 to 9 of the Act as to powers of investment, which it is not here necessary to particularise.

Disposition.

Perhaps the most conspicuous of all the changes effected by the Act are those by which a married woman is now enabled to dispose of all her separate property under the Act as freely as a *feme sole*. Separate property under the Act (as above described) can be aliened where a deed is required without separate examination or deed acknowledged, or the husband's concurrence (*m*). But this does

(*k*) *Jupp* v. *Buckwell*, 39 Ch. D. 148; 57 L. J. Ch. 774; *Byram* v. *Tull*, 42 Ch. D. 306; *Thornley* v. *T.*, (1893) 2 Ch. 227; 62 L. J. Ch. 370; *Mander* v. *Harris*, 27 Ch. D. 166; 24 *ib.* 222; 52 L. J. Ch. 680.

(*l*) *Symonds* v. *Hallett*, 24 Ch. D. 346; 53 L. J. Ch. 60; *Wood* v. *W.*, 19 W. R. 1049.

(*m*) *Riddell* v. *Errington*, 24 Ch. D. 220; 54 L. J. Ch. 293.

not apply to interests vested before the Act in women married before the Act, such not being separate property under the Act (*n*); and though a married woman mortgagee can convey the mortgaged estate without her husband's concurrence or deed acknowledged (*o*), she cannot so convey real estate vested in her merely as a trustee (*p*).

Testamentary power.

Again, testamentary power was given to married women by the Act of 1882 as to both real and personal separate property; but it was held that the power only extended to property of which she was seised or possessed *during coverture;* so that in case of her husband's death, her will had to be re-executed in order to be effectual to pass property subsequently acquired (*q*). But now by the Married Women's Property Act, 1893 (*r*), s. 24 of the Wills Act is made applicable to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and the will need not be re-executed or republished after the death of her husband. This applies to all wills of married women who die after the 5th of December, 1893 (*s*).

By s. 23 it is enacted, that for the purposes of the Act, the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living. The interpretation of these words is by no means easy; but it is submitted that their effect is no more than to assimilate the administration of

(*n*) *Re Harris' Settled Est.*, 28 Ch. D. 171; 54 L. J. Ch. 208.

(*o*) *Re Brooke and Fremlin's Contract*, (1898) 1 Ch. 647; 67 L. J. Ch. 272; *Re Drummond's Contract*, (1891) 1 Ch. 524; 60 L. J. Ch. 258; *Re Batt's Settled Estate*, 1897, 2 Ch. 65; 66 L. J. Ch. 635.

(*p*) *Re Harkness and Allsop's Contract*, (1896) 2 Ch. 358; 65 L. J. Ch. 726.

(*q*) *Stafford* v. *S.*, 28 Ch. D. 709; *Trye* v. *Sullivan*, *ib.* 705; *Bilke* v. *Roper*, 45 Ch. D. 632; *James* v. *J.*, (1892) 2 Ch. 29; 61 L. J. Ch. 432; *Mansfield* v. *M.*, 43 Ch. D. 12.

(*r*) 56 & 57 Vict. c. 63, s. 3.

(*s*) *Wylie* v. *Moffat*, (1895) 2 Ch. 116; 64 L. J. Ch. 613.

the separate property under the Act of a deceased married woman to that of a *feme sole*, but without prejudice to the rights of her husband (*t*). The executor or administrator will at any rate succeed to a complete representation of the deceased's *personal* estate, not merely taking as an appointee under a power as formerly in the case of separate estate in equity. A further consequence of this change will be that separate property under the Act will now be legal assets (*u*). It is to be observed the section is not in terms confined to personal estate, but it would be not a little surprising if it should be held that it operates so as to abolish, as far as married women are concerned, all the rules as to the descent of real property. And it has been held that the Act does not interfere with the law as to intestate succession; and that the rights of her heir, and the curtesy of her husband as to realty, and the right of her husband to the administration and beneficial enjoyment of her personalty remain (*v*).

Intestate succession.

As an incident to the possession and enjoyment of property the Act renders a married woman liable to the extent thereof for the maintenance of her husband, children, and grandchildren (*x*).

Married woman trustee, &c.

By ss. 18 and 24 it is provided that a married woman may not only hold separate property beneficially, but she may accept the offices of executrix or administratrix or trustee, without her husband's consent, and without rendering him liable for any devastavit which she may commit (*y*). She is expressly enabled to perform such administrative acts as are necessary in such an office.

(*t*) *Elder* v. *Pearson*, 25 Ch. D. 620; 53 L. J. Ch. 174; *Stanton* v. *Lambert*, 39 Ch. D. 628; 57 L. J. Ch. 927.

(*u*) See *Brandon* v. *Hughes*, (1898) 1 Ch. 529; 67 L. J. Ch. 279.

(*v*) *Hope* v. *H.*, (1892) 2 Ch. 336; 61 L. J. Ch. 441. See rules as to deposits in post office savings banks, and Scotch Act, 44 & 45 Vict. c. 21.

(*x*) Sects. 20, 21.

(*y*) See *Re Ayres*, 8 P. D. 168; but as to her husband's concurrence in the conveyance of trust property, see *sup.* p. 437.

2. *Contractual powers under the Act.*

Power to contract conferred.

We have seen that the second of the fundamental changes effected by the Act of 1882 was to confer on a married woman the power of contracting in respect of, and to the extent of, her separate property as if she were a *feme sole*. The Act further adds that every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to, and to bind her separate property, unless the contrary be shown; and that every such contract shall bind not only property possessed by her at the date of the contract, but also all the separate property which she may thereafter incur. It was, however, held under this statute that a married woman's contract was only valid in case she had, at the time of making the contract, free separate property not subject to a restraint on anticipation (*z*). But now by the Married Women's Property Act, 1893 (*a*), sub-sections (3) and (4) of s. 1 of the Act of 1882 are repealed, and it is provided that every contract entered into by a married woman after December 5th, 1893 (otherwise than as agent), shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract, shall bind all separate property which she may at that time or thereafter be possessed of or entitled to, and shall be enforceable against all property which she may thereafter, while discovert, be possessed of or entitled to; but the effect of a restraint on anticipation is preserved, except that the Court is empowered to order and enforce the payment of the costs of an action brought by a married woman out of property subject to restraint (*b*).

(*z*) *Palliser* v. *Gurney*, 19 Q.B.D. 519; 56 L. J. Q. B. 546; *Deakin* v. *Lakin*, 30 Ch. D. 169; 55 L. J. Ch. 44; *Stogdon* v. *Lee*, (1891) 1 Q. B. 661; 60 L. J. Q. B. 669; *Leek* v. *Driffield*, 24 Q. B. D. 98; 59 L. J. Q. B. 89.

(*a*) 56 & 57 Vict. c. 63.

(*b*) *Hood-Barrs* v. *Cathcart*, (1895) 1 Q. B. 873; 64 L. J. Q. B. 520.

Bankruptcy.

As a natural consequence of the power thus conferred, a married woman who carries on a trade separately from her husband (*c*) is, in respect of her separate property, rendered liable to the bankruptcy laws as if she were a *feme sole;* and she is deemed to be carrying on trade so long as any trade debts remain unpaid (*d*). A business may be carried on separately from her husband within the meaning of the Act notwithstanding that it is carried on in the house in which the husband and wife live together (*e*).

Limitations of the remedy.

We have seen that, in equity, although effect was given to the engagements of a married woman, by holding them as binding on her separate estate, the remedy fell short of that which, in the case of a man or a *feme sole*, is juristically incident to a breach of contract, inasmuch as no judgment could be enforced against her personally. And in conformity with this it was held, that judgment could not be signed against a married woman under Ord. XIV. (*f*). And though the remedy is enlarged by the above section, it is still less extensive than that which is available in other cases. Not only does the effect of a restraint on anticipation remain unaffected, so that property subject thereto is during coverture protected against debts (*g*), but apart from this, an unconditional judgment cannot even now be entered up against a married woman. Her power of contracting being limited as above to her separate property, not subject to restraint, the judgment can only operate to this extent, and it must be framed accordingly (*h*).

(*c*) *Exp. Coulson*, 20 Q. B. D. 249; 57 L. J. Q. B. 149.

(*d*) *Re Dagnall*, (1896) 2 Q. B. 407; 65 L. J. Q. B. 666; *Re Worsley*, (1901) 1 Q. B. 309; 70 L. J. K. B. 93.

(*e*) *Re Worsley, sup.;* and see also as to the operation of remedy under the section, *Exp. Levene*, (1895) 1 Q. B. 328; 64 L. J. Q. B. 185; *Exp. Boyd*, 21 Q. B. D. 264; 57 L. J. Q. B. 553; *Re A Debtor*, (1898) 2 Q. B. 576; 67 L. J. Q. B. 820; *Re Handford*, (1899) 1 Q. B. 566; 68 L. J. Q. B. 386; *Re Lynes*, (1893) 2 Q. B. 113; 62 L. J. Q. B. 372.

(*f*) *Durrant* v. *Ricketts*, 8 Q. B. D. 177.

(*g*) See *Pelton* v. *Harrison*, (1891) 2 Q. B. 422; 60 L. J. Q. B. 742; *Briggs* v. *Ryan*, (1899) 2 Ch. 717; 68 L. J. Ch. 663; *Barnett* v. *Howard*, (1900) 2 Q. B. 784; 69 L. J. Q. B. 995.

(*h*) *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Draycote* v. *Harrison*, 17 *ib.* 147.

Moreover, the remedy of a creditor affects only the property, and a judgment cannot be enforced by committal (*i*).

By s. 4 separate estate is declared to include any property subject to a general power of appointment which a married woman may have exercised by her will, but such property is not liable in the event of her bankruptcy (*k*). It has been held that property so appointed is not liable to the payment of debts incurred before the Act (*l*), but even apart from the Act of 1893, appointed property was applied to the discharge of contracts entered into at a time when the married woman had no separate estate (*m*).

A wife may enter into a binding contract with her husband as well as with a third person (*n*); but special provision is made by s. 3 of the Act that, in the case of a loan by a wife to a husband for the purpose of any trade or business carried on by him or otherwise, she can only prove in respect thereof in his bankruptcy or in the case of his death insolvent after all his other creditors for valuable consideration have been paid in full (*o*). But notwithstanding the words "or otherwise," it would seem that the section does not apply to a loan to a husband who is not in business (*p*), and that the wife does not necessarily labour under the onus of proving that the loan was not for the purposes of business (*q*). The section, moreover, does not prevent the retainer of her debt by a widow who is executrix (*r*).

(*i*) *Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43; *Downe* v. *Fletcher*, 26 Q. B. D. 11. As to the extent of the personal liability, see also *Robinson* v. *Lynes*, (1894) 2 Q. B. 577; 63 L. J. Q. B. 759; *Pelton* v. *Harrison*, (1892) 1 Q. B. 118; 61 L. J. Q. B. 144.

(*k*) *Exp. Gilchrist*, 17 Q. B. D. 167, 521; 55 L. J. Q. B. 528.

(*l*) *Roper* v. *Doncaster*, 39 Ch. D. 482; 58 L. J. Ch. 215.

(*m*) *Wilson* v. *Ann*, (1894) 1 Ch. 549; 63 L. J. Ch. 334.

(*n*) *Butler* v. *B.*, 16 Q. B. D. 374; 14 *ib.* 831; 55 L. J. Q. B. 55; *McGregor* v. *McG.*, 20 Q. B. D. 529.

(*o*) See *Re Genese*, 16 Q. B. D. 700; 55 L. J. Q. B. 118; *Tarn* v. *Emmerson*, (1895) 1 Ch. 652; 64 L. J. Q. B. 468.

(*p*) *Macintosh* v. *Pogose*, (1895) 1 Ch. 505; 64 L. J. Ch. 274; *Re Clarke*, (1898) 2 Q. B. 330.

(*q*) *Re Cronmire*, (1901) 1 Q. B. 480; 70 L. J. K. B. 310; see *Paget* v. *P.*, (1898) 1 Ch. 470, 474; 67 L. J. Ch. 266.

(*r*) *Crawford* v. *May*, 45 Ch. D. 499.

By s. 11, express provision is made for the effecting of life assurances by husbands and wives for their mutual benefit and that of their children, and for the appointment of trustees of the policy moneys and their protection against the debts of the insured, so long as any of the trusts declared thereof remain unperformed (*s*).

Ante-nuptial debts.

The liability of husband and wife for the ante-nuptial debts of the wife is under the various statutes a matter of some complication; but a brief summary of the law thereon must suffice. The case of women married before the Act of 1870 is now of little practical importance. Generally, it may be said that on marriage the husband became liable to all his wife's debts, and the wife, whose property in possession at once passed to her husband, was *ipso facto* released therefrom.

Act of 1870.

The Act of 1870 enacted that a wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, her debts contracted before marriage as if she had continued unmarried (*t*); and since that Act, a restraint on anticipation has been no protection against *ante-nuptial* debts (*u*). But if no property of the wife was reserved to her separate use on the marriage, there was no remedy against her. The same section relieved the husband from all liability in respect of these debts.

Act of 1874.

The Act of 1874 did not affect the wife's liability, but rendered the husband liable for ante-nuptial debts of the wife to the extent of any property passing to him *jure mariti* at the marriage or during the marriage (*x*).

Act of 1882.

Both these Acts are repealed by that of 1882, ss. 13 and 14 of which now regulate the liability for ante-nuptial debts of women married since the Act. Under

(*s*) See *Re Davies' Policy*, (1892) 1 Ch. 90; 61 L. J. Ch. 650; *Turnbull* v. *T.*, (1897) 2 Ch. 415; 66 L. J. Ch. 719.

(*t*) 33 & 34 Vict. c. 93, s. 12.

(*u*) *Sanger* v. *S.*, 11 Eq. 470; *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; *Axford* v. *Reid*, 22 Q. B. D. 548; 58 L. J. Ch. 230; *Jay* v. *Robinson*, 25 Q. B. D. 467; 59 L. J. Q. B. 367.

(*x*) 37 & 38 Vict. c. 50.

these the wife after marriage remains liable not only to the full extent of her separate property but also personally (*y*), and the husband is only liable to the extent of property acquired from or through his wife. It will be seen that he can now only so acquire property by gift, settlement, will, or intestate succession, and the Court is empowered in an action against him to direct an inquiry or proceedings for the purpose of ascertaining the value of property so acquired (*z*).

Sect. 19 of the Act expressly preserves the effect of any marriage settlement or agreement for a settlement, and of any restriction against anticipation attached to the enjoyment of property or income by a married woman under any instrument; provided, however, that no such restriction contained in any settlement of a woman's own property made or entered into by herself shall have any validity against ante-nuptial debts (*a*), and that no settlement or agreement for a settlement shall have any greater force or validity against her creditors than a like settlement or agreement for a settlement entered into by a man. The principles of equity affecting voluntary settlements entered into by men have already been considered (*b*).

The provisions of the Act as to the rights and liabilities of married women in matters of tort, and as to procedure and evidence, are too remote from the subject of equity to call for exposition here.

(*y*) *Robinson* v. *Lynes*, (1894) 2 Q. B. 577; 63 L. J. Q. B. 759.

(*z*) See *Beck* v. *Pierce*, 23 Q. B. D. 316; 58 L. J. Q. B. 516; *Surman* v. *Wharton*, (1891) 1 Q. B. 491; 60 L. J. Q. B. 233.

(*a*) *Sanger* v. *S.*; *Axford* v. *Reid*, *sup.*

(*b*) *Supra*, p. 54 *et seq.*

CHAPTER VIII.

INFANTS.

I. *Guardianship.*
  1. *Obsolete species of Guardianship.*
  2. *Guardianship of Parents.*
  3. *Testamentary Guardians.*
  4. *Guardians appointed by a Stranger.*
  5. *Guardians appointed by the Court.*

II. *Maintenance.*
  1. *Out of what Property directed.*
  2. *In what circumstances.*

III. *Advancement.*
  1. *Under a Power.*
  2. *In absence of a Power.*

Note.—Jurisdiction as to Lunatics.

Guardianship.

I. Apart from statutory enactments, the Court of Chancery from the earliest times exercised a very beneficial jurisdiction over infants; and that jurisdiction has now been conferred upon the Chancery Division of the High Court of Justice (*a*). The greater part of the law respecting this subject relates to the incidents and characteristics of guardianship; the first and most important duty before us, therefore, is to enumerate the different species of guardians which are recognised in equity, and to ascertain the powers and responsibilities of each.

(*a*) 36 & 37 Vict. c. 66, s. 34.

The fullest discussion of the subject is found in the leading case of *Eyre* v. *The Countess of Shaftesbury* (*a*), in which the whole jurisdiction of the Court in matters of guardianship was passed under elaborate review. We shall presently have to advert to the precise points raised and settled in this case; but before doing so there are some matters requiring consideration which were only incidentally referred to therein.

1. *Obsolete species of guardianship.*

Obsolete species of guardianship.

At different periods of the history of equity, several species of guardianship were recognised which have now little more than an antiquarian interest. Some having been expressly abolished by statute, and others having fallen into desuetude, it is only necessary here to enumerate them: we refer to guardianship in chivalry, guardianship in socage, guardianship by the appointment of the Ecclesiastical Courts, guardianship by election and by custom, and guardianship under 4 & 5 Ph. & Mary, c. 8.

2. *The guardianship of parents.*

Guardianship of a father.

By nature and nurture the father is indisputably the guardian of his children (*b*), and he may exercise the rights of guardianship even in opposition to their mother (*c*). Until quite recently the Courts so respected this natural right as to refuse, save under very exceptional circumstances, to enforce a contract entered into by a father to give up to his wife the custody and education of their children (*d*), on the ground that it was opposed to public policy. But by 36 Vict. c. 12, it was enacted that no agreement contained in a separation deed made between the father and mother of an infant shall be held to be invalid by reason only of its providing that the father

36 Vict. c. 12.

(*a*) 2 P. Wms. 103; 2 W. & T. L. C. 633.
(*b*) *Exp. Hopkins*, 3 P. Wms. 152.
(*c*) *Exp. M'Clellan*, 1 Dowl. 81.
(*d*) *Hope* v. *H.*, 8 De G. M. & G. 731; *Swift* v. *S.*, 34 Beav. 266.

shall give up the custody or control of such infant to the mother, provided that no Court shall enforce such agreement if it shall be of opinion that it will not be for the benefit of the infant to do so (*e*).

But an agreement by a husband before marriage that his children shall be brought up in a particular religion is not binding on him, and will not be enforced (*f*), unless, indeed, he has by gross moral turpitude forfeited his rights or has abandoned his right to educate his children in his own religion (*g*).

Court superintends guardianship.

Though no Court had inherent power actually to deprive a father of his legal right as guardian, his exercise of his natural guardianship was subject to the superintendence of the Court, which would, if necessary, interfere between him and his children by appointing a person to act as guardian. This part of its jurisdiction was well established in the case of *Wellesley* v. *Beaufort* (*h*); but in order to justify such interference there must be strong circumstances showing that it will be for the benefit of the children.

When guardianship of father interfered with.

Thus, prior to 36 Vict. c. 12, the mere fact of the father's poverty, or even insolvency, would not suffice (*i*); nor would acts amounting to severity or harshness, unless extreme, or of such a nature as to corrupt the morals of his children (*k*). Even where a father was living in adultery, but did not bring his children into contact with his paramour, the Court refused to deprive him of their custody (*l*).

Insolvency, desertion,

But where, coupled with insolvency, the character of the father is bad (*m*), or he has deserted his children (*n*), or

(*e*) See *Condon* v. *Vollum*, 57 L. T. R. 154.

(*f*) *Agar-Ellis* v. *Lascelles*, 10 Ch. D. 49; 24 *ib.* 317; 53 L. J. Ch. 10; *Re Browne*, 2 Ir. Ch. R. 151; *Re Violet Nevin*, (1891) 2 Ch. 299; 60 L. J. Ch. 542.

(*g*) *Andrews* v. *Salt*, 8 Ch. 622, 637; *Re Clarke*, 21 Ch. D. 817; 51 L. J. Ch. 762; *Re Newton* (*infants*), (1896) 1 Ch. 740; 65 L. J. Ch. 641.

(*h*) 2 Russ. 1; 2 Bli. N. S. 124. See *Smart* v. *S.*, (1892) A. C. 425; 61 L. J. P. C. 38; *Re A. and B.*, (1897) 1 Ch. 786; 66 L. J. Ch. 592.

(*i*) *Kilpatrick* v. *K.*, Macph. 143; *In re Fynn*, 2 De G. & Sm. 457.

(*k*) *Curtis* v. *C.*, 5 Jur. N. S. 1147; *Re Spence*, 2 Ph. 252.

(*l*) *Ball* v. *B.*, 2 Sim. 35.

(*m*) *Exp. Mountfort*, 15 Ves. 445.

(*n*) *Creuze* v. *Hunter*, 2 Cox, 242.

is endangering their property or neglecting their education (*o*), there is sufficient ground for interference.

Even in the absence of any pecuniary difficulties of the father, if his habits are notoriously immoral, and such as are likely to corrupt his children, or imbue them with irreligious notions, the Court has not hesitated to remove them from his control (*p*). Habits of habitual drunkenness and profanity have led to the same result (*q*). immorality.

The power of the Court in this direction has been considerably and advantageously extended by statute. First, by 2 & 3 Vict. c. 54, the Court was enabled to give to a mother access to her children, and even custody of them, up to the age of seven years, in case of ill-treatment by her husband. More recently this Act was replaced by 36 Vict. c. 12, which empowers the Court upon petition of a mother by her next friend, to give her a right of access to any infant under sixteen years of age at such times and subject to such regulations as may seem proper, or to order that any such infant shall be delivered to the mother and remain under her custody and control until it shall attain that age, subject to such regulations as may seem proper. In determining what under this Act are a mother's rights, the Court will have regard to three matters: the paternal right, the marital duty, and the infant's interest (*r*). By the Custody of Children Act, 1891 (*s*), the Court is empowered to refuse to order the production or delivery up of a child even to its parent, if it is of opinion that the parent has deserted the child or otherwise so conducted himself as to render himself an unsuitable person to have such custody. The infant's interest is the paramount consideration (*t*). 2 & 3 Vict. c. 54. 36 Vict. c. 12. 54 Vict. c. 3.

Apart from statute, it had been decided that in case of

(*o*) *Re England*, 1 R. & M. 499; *Thomas* v. *Roberts*, 3 De G. & Sm. 758.

(*p*) *Shelley* v. *Westbrooke*, Jac. 266; *Wellesley* v. *Beaufort*, 2 Russ. 1.

(*q*) *De Manneville* v. *De M.*, 10 Ves. 62.

(*r*) *Re Elderton*, 25 Ch. D. 220; 53 L. J. Ch. 258; *Re Taylor*, 4 Ch. D. 157.

(*s*) 54 Vict. c. 3.

(*t*) *Re Gyngall*, (1893) 2 Q. B. 232; 62 L. J. Q. B. 559.

Rights of a mother.

the death of a father without his having appointed a testamentary guardian as hereafter mentioned, the mother, if surviving, became the natural guardian of the children (*u*). The mother's guardianship or right to the custody of her illegitimate child has now been allowed (*x*); but nevertheless, the natural claims of a mother as to her children were very insufficiently recognized. The statutes already cited operated in some degree to favour her rights, but their operation has been largely superseded by the more extensive enactment presently to be noticed.

3. *Testamentary guardians.*

Testamentary guardians. 12 Car. II. c. 24.

By 12 Car. II. c. 24, power was conferred upon a father, even though a minor, of appointing by deed or will guardians for his legitimate children during minority. Now, by 1 Vict. c. 26, a minor can no longer make an effectual will for any purpose; but the power of a minor to appoint a guardian by deed still remains. The statute conferred no corresponding power on a mother, and her natural guardianship is superseded by the father's testamentary appointment: the mother, however, may of course be appointed herself to the office.

Guardianship Act, 1886.

The hardship wrought on mothers by this Act has but recently been relieved by the provisions of the Guardianship of Infants Act, 1886 (*y*). By this Act it is provided that on the death of the father of an infant, the mother, if surviving, shall be guardian either alone (if no guardian has been appointed by the father) or jointly with any guardian appointed by him (*z*). It further enables the mother of any infant by deed or will to appoint guardians after the death of herself and the father of such infant (if such infant be then unmarried); and where guardians are appointed by both parents, they are to act jointly. It also

(*u*) *Villareal* v. *Mellish*, 2 Swanst. 533.

(*x*) *Barnardo* v. *McHugh*, (1891) A. C. 388; 61 L. J. Q. B. 721.

(*y*) 49 & 50 Vict. c. 27, ss. 2, 3.

(*z*) See *Re G*—— (*an infant*), (1892) 1 Ch. 292; 61 L. J. Ch. 490.

enables her to make a provisional nomination of some fit person or persons to act jointly with the father after her death, and the Court, after her death, if it be shown that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment so made, or make such other order in respect of the guardianship as the Court shall think right. Guardians under this Act are to have the powers of guardians appointed under 12 Car. II. c. 24. Further, the Court may, upon the application of the mother of any infant, make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant, the conduct of the parents, and the wishes as well of the mother as of the father (*a*). The Court now has jurisdiction to entirely override the common law rights of a father in relation to the custody of his infant children, and to give equal weight to the wishes of the mother (*b*).

How appointed.

No particular form of words is required for the appointment of a testamentary guardian. Such expressions as "my son and daughter to be under the care and direction of A. and B." (*c*), and a direction to C. to "take the care and management of my children" (*d*), have been held sufficient. But where the words used refer only to the property of the children—*e.g.*, "to be guardian of the estate" of the children—they will not constitute a person a guardian (*e*).

Passes by survivorship.

The leading case of *Eyre* v. *Shaftesbury* (*f*) decides that where more than one guardian is appointed by will the office passes to the survivor. A testator may, under the statute, give to the survivor the power of nominating a

(*a*) See *Re Witten*, 57 L. T. R. 336. For rules of procedure under this Act, see W. N. Feb. 4th, 1888.

(*b*) *Re A. and B.* (*infants*), (1897) 1 Ch. 786; 66 L. J. Ch. 592.

(*c*) *Bridges* v. *Hales*, Mos. 108.

(*d*) *Miller* v. *Harris*, 14 Sim. 540.

(*e*) *Re Norbury*, 9 I. R. Eq. 134.

(*f*) 2 P. Wms. 103.

successor to one who has died (*g*); but guardianship is not assignable. *Delegatus non potest delegare* (*h*).

Disclaimer.

It is open to a testamentary guardian to disclaim the office before acting therein (*i*); but after acting in the office he cannot renounce it (*k*).

Testamentary guardian a trustee.

A testamentary guardian is a trustee; so that the Statute of Limitations does not run in his favour in an account between him and his ward (*l*). The claim of the ward may, however, be lost by a long acquiescence in the acts of the guardian (*m*).

Office not determined by marriage of ward.

Testamentary guardianship is clearly not determined by the marriage of a male ward (*n*), nor, it would seem, by the marriage of a female ward (*o*).

Powers of guardian.

The powers of a testamentary guardian are extensive. He is generally entitled to the custody of the persons of his wards (*p*); and unless some contrary wish is expressed by the father (*q*), he may regulate and superintend their education, and compel their obedience (*r*).

Superintendence of the Court.

Parental guardianship being subject to the superintendence of the Court, *à fortiori* so also is a testamentary guardian. Under the Act of 1886 (*s*), the Court may, in its discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian or any guardian appointed or acting by virtue of that Act, and, if it thinks fit, may appoint another guardian in the place of the one so removed.

Bankruptcy.

It was held under the earlier and less stringent law that the bankruptcy or insolvency of a testamentary guardian

(*g*) *In the goods of Parnell*, L. R. 2 P. & D. 379.
(*h*) *Mellish* v. *De Costa*, 2 Atk. 14.
(*i*) *O'Keeffe* v. *Casey*, 1 S. & L. 106.
(*k*) *Spencer* v. *Chesterfield*, Amb. 146.
(*l*) *Mathew* v. *Brise*, 14 Beav. 341.
(*m*) *Sleeman* v. *Wilson*, 13 Eq. 36.
(*n*) *Eyre* v. *Shaftesbury*, 1 P. Wms. 103.
(*o*) *Roach* v. *Garvan*, 1 Ves. sr. 160.
(*p*) *Exp. E. of Ilchester*, 7 Ves. 381.
(*q*) *Knott* v. *Cottee*, 2 Ph. 192.
(*r*) *Hall* v. *H.*, 3 Atk. 721; *Tremain's Ca.*, 1 Stra. 173; *G*—— v. *L*——, (1891) 3 Ch. 126; 60 L. J. Ch. 705.
(*s*) 49 & 50 Vict. c. 27.

would justify the appointment of a person to take his place (*t*); but the mere fact of a guardian having a pecuniary interest in the death of his ward, will not, as in Roman law, disqualify him for his office, or be a ground for superseding him (*u*).

In the superintendence of testamentary guardians by the Court there is an element to be considered which is wanting in the case of parental guardianship, namely, that the wishes of the father (and now, as we have seen, of the mother also), both express and implied, are regarded with respect; but since in cases where questions as to these arise the principles applied are similar to those which regulate the conduct of guardians appointed by the Court itself, we shall, to avoid repetition, postpone their discussion until dealing with this last species of guardianship.

4. *Guardians appointed by a stranger.*

Guardians appointed by strangers.

The power of a stranger to appoint guardians of an infant during his father's life can only be derived through the waiver of his right by the father. One of the cases most frequently cited with reference to this is *Powel* v. *Cleaver* (*x*), where a testator gave considerable legacies to his sister, her husband, and their infant children, upon the express condition that his executor should be guardian of the children during minority. The father acquiesced in the arrangement, accepted the benefits conferred upon him, and received the maintenance provided for the children. Afterwards he wished to resume the guardianship himself. This was refused, as not being consistent with the interests of the children (*y*).

Waiver by father.

It is necessary in such cases that there should have been a voluntary waiver of his rights by the father. The Court will not interfere to compel him to do this simply because

(*t*) *Smith* v. *Bate*, 2 Dick. 631; *Heysham* v. *H.*, 1 Cox, 179.
(*u*) *Morgan* v. *Dillon*, 9 Mod. 135.
(*x*) 2 Bro. C. C. 499.
(*y*) See also *Colston* v. *Morris*, Jac. 257, n.; *Andrews* v. *Salt*, 8 Ch. 622, 640; *Re Newton*, (1896) 1 Ch. 740; 65 L. J. Ch. 641.

a stranger offers to maintain the children (*z*); and it is open to a father to rescind and abandon an agreement of this nature at any time before it has been acted upon so as to alter the status of the child (*a*).

Guardianship created in this manner is of course subject to the supervision of the Court, on the same principles as testamentary guardianship.

5. *Guardians appointed by the Court.*

Guardians appointed by the Court.

Whatever may have been its origin, as to which there has been much learned dispute, it was a well-established part of the jurisdiction of the Court of Chancery to appoint guardians of infants when necessary; and this jurisdiction is now, as we have seen, vested in the Chancery Division of the High Court of Justice.

When the jurisdiction arises.

The jurisdiction arises whenever an action is commenced in Chancery relative to the estate or person of an infant, and none the less because the father or a testamentary guardian is alive (*b*); or if without suit an order for maintenance is made on summons in Chambers (*c*), or on a petition respecting money belonging to an infant paid into Court (*d*). In all these cases an infant is said to become a ward of Court. But in order to the exercise of the jurisdiction it is generally necessary that some property of the infant should be in its power (*e*); and thus when it is desired to make an infant a ward of Court it is usual to settle a sum of money or other property on him for the purpose (*f*). The jurisdiction, however, is not limited to such cases, being inherent by virtue of the prerogative which belongs to the Crown as *parens patriæ* (*g*). In addition to the above general powers of the Court, the

(*z*) *Lyons* v. *Blenkin*, Jac. 245, 264; *Re Fynn*, 2 De G. & S. 457.
(*a*) *Hill* v. *Gomme*, 1 Beav. 540; 5 My. & Cr. 680.
(*b*) *Butler* v. *Freeman*, Amb. 303; *De Pereda* v. *De Mancha*, 19 Ch. D. 451; 51 L. J. Ch. 204.
(*c*) *Re Graham*, 10 Eq. 530.
(*d*) *Re Hodge's Sett.*, 3 K. & J. 213.
(*e*) *Wellesley* v. *Beaufort*, 2 Russ. 21.
(*f*) *Re Lyons*, 22 L. T. N. S. 770.
(*g*) *Re Spence*, 2 Ph. 247, 252; *Barnardo* v. *McHugh*, (1891) A. C. 388, 395; 61 L. J. Q. B. 721.

Guardianship Act, 1886, enables the Court to appoint a guardian or guardians to act jointly with the mother whenever no guardian has been appointed by the father, or whenever the guardian so appointed is dead or refuses to act (*h*). But the fact that the mother has married a second husband of a different faith is not of itself sufficient to justify the exercise of the power, so long as there is no personal misconduct or interference with the proper bringing up of the infant (*i*).

Under 4 Geo. IV. c. 76.

Without any suit pending, and although the infant has no property, the Court may upon petition appoint a guardian under 4 Geo. IV. c. 76, s. 17, to give consent to a marriage (*k*), or make an order for the delivery of an infant to a person who has a right to its custody (*l*); or it may appoint a guardian of the person and estate of an infant; but an infant does not in any of these cases become a ward of Court.

Married woman not appointed alone.

The Court will not ordinarily appoint a married woman (other than the mother) to be a sole guardian (*m*). When two or more guardians are appointed by the Court, the office does not upon the death of one survive, as in the case of testamentary guardianship; there must be a new appointment (*n*).

Office does not survive.

Father's wishes followed.

In the appointment of a guardian the wishes of the father of the infant, if alive, are regarded, even in the case of natural children (*o*); and in their education, his wishes, whether expressed or implied, are usually followed. In the absence of a direction to the contrary, the Court presumes that he desires his children to be educated in his own religion (*p*). And it is immaterial that his religion

(*h*) *Re McGrath* (*infants*), (1893) 1 Ch. 143; 62 L. J. Ch. 208.

(*i*) *X.* v. *Y.*, (1899) 1 Ch. 526; 68 L. J. Ch. 265.

(*k*) *Re Woolscombe*, 1 Madd. 313.

(*l*) *Re Spence*, *sup.*

(*m*) *Re Kaye*, 1 Ch. 387.

(*n*) *Bradshaw* v. *B.*, 1 Russ. 528.

(*o*) *Peckham* v. *P.*, 2 Cox, 46.

(*p*) *Re Newbery*, 1 Eq. 431; 1 Ch. 263; *Hawksworth* v. *H.*, 6 Ch. 539; *Re Clarke*, 21 Ch. D. 817; 51 L. J. Ch. 762; *Montague* v. *Festing*, 28 Ch. D. 82; *Re Scanlan*, 40 Ch. D. 200; 57 L. J. Ch. 718; *Re Violet Nevin*, (1891) 2 Ch. 299; 60 L. J. Ch. 542.

is not that of the Established Church (*q*). No *pecuniary* benefit to the child will induce the Court to depart from the course of religious instruction pointed out by the father (*r*).

Change of religion discountenanced.

Where, however, children have been brought up in a particular religion until they have reached such an age as to have formed definite religious opinions, even though in opposition to the wishes of the father, the Court is very reluctant to interfere, because of the peril of unsettling the foundations of all faith by a compulsory change (*s*); and the Court has sometimes conversed with the infant to ascertain the extent of its knowledge and the character of such opinions as it has formed (*t*). A guardian has been removed from office on changing his religion (*tt*).

Wards not to be taken out of jurisdiction, save under special circumstances.

In general the Court will not allow its wards to be taken out of its jurisdiction (*u*); and if from special circumstances the removal is allowed, security will be required for their return (*x*), and the Court must be kept informed as to their whereabouts and treatment (*y*). The health of a ward (*z*), the desirability of children living with their parents (*a*), and the enlistment of a ward in the army (*b*), have been deemed sufficient grounds for permitting a temporary residence beyond the jurisdiction. The question is determined by what the Court esteems to be for the benefit of the infant, always provided that it is satisfied of obedience to its decrees (*c*). To remove a ward from the jurisdiction without leave of the Court is a contempt which will be severely visited on the offender (*d*).

(*q*) *Talbot* v. *Shrewsbury*, 4 My. & Cr. 672.

(*r*) *Ibid.* 686.

(*s*) *Re Newton* (*infants*), (1896) 1 Ch. 740; 65 L. J. Ch. 641; *Re McGrath*, (1892) 2 Ch. 496; (1893) 1 Ch. 143; 62 L. J. Ch. 208.

(*t*) *Witty* v. *Marshall*, 1 Y. & C. Ch. 68; *Stourton* v. *S.*, 8 De G. M. & G. 760.

(*tt*) *F.* v. *F.*, (1902) 1 Ch. 688.

(*u*) *De Manneville* v. *De M.*, 10 Ves. 52.

(*x*) *Jeffrys* v. *Vanteswarstwarth*, Barn. Ch. R. 141; *Biggs* v. *Terry*, 1 My. & Cr. 675.

(*y*) *Anon.*, Jac. 265, n.; *Logan* v. *Fairlie*, Jac. 193.

(*z*) *Wyndham* v. *W.*, 1 Kee. 467.

(*a*) *Lethem* v. *Hall*, 7 Sim. 141.

(*b*) *Rochford* v. *Hockman*, Kay, 308.

(*c*) *Elliott* v. *Lambert*, 28 Ch. D. 186; 54 L. J. Ch. 292.

(*d*) *Rochford* v. *Hockman*, *sup.*

Guardians of foreign infant.

The Court may appoint guardians of an alien infant resident within its jurisdiction, and this notwithstanding that guardians may have been already appointed in the child's own country (*e*); and though foreign guardians are eligible to be appointed, the Court usually prefers a person within its jurisdiction and control (*f*). The jurisdiction does not, however, apply to alien infants resident abroad (*g*). The Court will give effect to the orders of foreign Courts with respect to such children, unless they conflict with our own jurisprudence.

Marriage of wards.

The Court reasonably acts with great circumspection and strictness respecting the marriage of its wards. Whether they be male or female, and whether or not they have parents or guardians living, it is necessary to apply to the Court for permission before their marriage can take place (*h*). To marry a ward without such permission is a gross contempt of Court, and the husband, and all persons aiding and abetting the marriage, are liable to imprisonment (*i*); ignorance of the fact that the infant is a ward does not excuse the contempt (*k*). Where there is reason to suspect an unauthorized marriage, the Court will, by injunction, restrain it, and interdict any communication between the ward and her suitor (*l*).

Guardian to give security.

A guardian appointed by the Court is commonly required to give security that the ward under his care shall not marry without leave of the Court; and if he is suspected of any connivance at an unsanctioned intimacy, the ward will be removed from his care and custody, and committed to the care of others (*m*).

(*e*) *Stuart* v. *M. of Bute*, 9 H. L. 440, 464; *Nugent* v. *Vetzera*, 2 Eq. 704.

(*f*) *Johnstone* v. *Beattie*, 10 Cl. & F. 42.

(*g*) *Brown* v. *Collins*, 25 Ch. D. 56; 53 L. J. Ch. 368; and see *Re Willoughby*, 30 Ch. D. 324; 54 L. J. Ch. 1122; *Re Bourgeoise*, 41 Ch. D. 310.

(*h*) *Smith* v. *S.*, 3 Atk. 305.

(*i*) *Wortham* v. *Pemberton*, 1 De G. & Sm. 644; *Exp. Mitchell*, 2 Atk. 173.

(*k*) *More* v. *M.*, 2 Atk. 157; *Herbert's Case*, 3 P. Wms. 116.

(*l*) *Pearce* v. *Crutchfield*, 14 Ves. 206.

(*m*) *Tombes* v. *Elers*, Dick. 88.

Marriage settlements.

When the Court grants leave for a marriage to take place, it is careful to see that a proper settlement of the ward's property is made; and to this end it will direct an inquiry in Chambers as to what settlement is proper (*n*). The nature of the settlement depends upon many circumstances, such as the fortune, station and conduct of the husband, and the extent of the property of the ward (*o*).

Where a marriage has taken place without the permission of the Court, the husband will be compelled to execute a proper settlement, and can only purge his contempt by doing so. Such a case will, of course, be treated more strictly against the husband than where he has acted openly; usually the settlement will entirely exclude the marital right and interest (*p*); but this rule has been relaxed where there has been no great difference in fortune between the parties (*q*) and where the husband has acted in ignorance (*r*).

Settlement by female ward on majority.

When a female ward of Court comes of age, she may generally settle her property as she pleases; but the Court will so far retain her property as to see that her action is free (*s*). An improper settlement, though made after her attaining majority, may be rectified at her request (*t*), and this has been done after a considerable lapse of time (*u*). Where the Court has approved a settlement, it will not allow its purpose to be defeated by the parties delaying the marriage until the lady is of age (*x*).

18 & 19 Vict. c. 43.

Previous to 18 & 19 Vict. c. 43, infants could not make binding settlements on their marriage, nor could the Court give validity to their settlements by adding its sanction (*y*).

(*n*) *Smith* v. *S.*, 3 Atk. 305; *Leeds* v. *Barnardiston*, 4 Sim. 538.

(*o*) *Ball* v. *Coutts*, 1 V. & B. 303; *Field* v. *Moore*, 7 De G. M. & G. 691.

(*p*) *Wade* v. *Hopkinson*, 19 Beav. 613.

(*q*) *Ball* v. *Coutts*, *sup.*

(*r*) *Richardson* v. *Merrifield*, 4 De G. & S. 161; and see as to form of settlement, *Re Sampson and Wall*, 25 Ch. D. 482; 53 L. J. Ch. 457.

(*s*) *Austen* v. *Halsey*, 2 S. & S. 123, n.

(*t*) *Long* v. *L.*, 2 S. & S. 119.

(*u*) *Cave* v. *C.*, 15 Beav. 227.

(*x*) *Hobson* v. *Ferraby*, 2 Coll. 412.

(*y*) *Savill* v. *S.*, 2 Coll. 72.

By that statute (explained by 23 & 24 Vict. c. 83), infants not being under twenty if male, or seventeen if female, can now, with the approbation of the Court, make binding settlements of their real and personal estate in possession or otherwise on their marriage. A covenant to settle after-acquired property is within the Act (*z*). The Court may, under this Act, direct a settlement of an infant's property after marriage (*a*), but it has no power to compel a ward of Court to make a settlement (*b*). An infant's settlement made without the sanction or confirmation of the Court may be repudiated after attaining full age, if the application to this effect is made within reasonable time (*c*).

II. *Maintenance.*

Another prominent feature in the jurisdiction of the Chancery Division of the High Court of Justice respecting infants is its power in certain cases to make provision for their maintenance out of the income of their property (*d*). The first question is out of what property maintenance can be directed; the second, in what circumstances it will be directed. Maintenance,

1. *Out of what property maintenance can be directed.* out of what directed.

(1.) The clearest case is where a fund is expressly given to a person for the maintenance of children. This may or may not be so done as to create a trust for the children: Express fund.

(*z*) *Moore* v. *Johnson*, (1891) 3 Ch. 48; 60 L. J. Ch. 499; *Hamilton* v. *H.*, (1892) 1 Ch. 396; 61 L. J. Ch. 220.

(*a*) *Re Sampson and Wall, sup.*; *Re Phillips*, 34 Ch. D. 467; 56 L. J. Ch. 337; *Re Potter*, 7 Eq. 484.

(*b*) *Buckmaster* v. *B.*, 35 Ch. D. 21; affirmed by H. L. *sub nom.* *Seaton* v. *S.*, 13 App. Cas. 61; 57 L. J. Ch. 661; *Leigh* v. *L.*, 40 Ch. D. 290; 58 L. J. Ch. 306.

(*c*) *Edwards* v. *Carter*, (1893) A. C. 360; 63 L. J. Ch. 100; *Farrington* v. *Forrester*, (1893) 2 Ch. 461; 62 L. J. Ch. 996.

(*d*) *Wellesley* v. *W.*, 2 Bli. N. S. 133.

in the former case the person so receiving the fund is accountable for its proper application; in the latter he is not (*e*). It is a matter of course depending upon the language of each particular instrument whether there is a trust or not; but where the gift is made to a person who is already legally bound to maintain the children—for instance, to their father—it requires a strong case to establish it as a trust; the presumption is that it is intended to confer a beneficial interest (*f*).

Income of express fund.

(2.) More commonly the *income* only of a fund is left for the maintenance of children; and in this case the person to whom it is so given is entitled to receive it as long as he continues properly to maintain them (*g*), and even though the language be such as to create a trust for maintenance, no account will be directed unless a special case is made out showing that some of the children have not been provided for (*h*). When some of the children originally comprised in such a gift have come of age, the whole fund remains applicable, if necessary, to the maintenance of those who are still infants; but if this is not necessary, the shares of the adults may be paid them (*i*).

Under powers.

(3.) It is usual in wills and settlements which confer property on infants, to insert powers for their maintenance; and under such powers trustees can safely apply either income or capital for that purpose, provided, of course, that they act within the terms of the power, and that their exercise of the power is *bonâ fide* and reasonable (*k*). If they refuse to do so the Court will not readily interfere with their discretion (*l*).

23 & 24 Vict. c. 145.

It having been found that hardship was often occasioned by the omission of such powers, a general power of apply-

(*e*) *Andrews* v. *Partington*, 2 Cox, 223.
(*f*) *Byne* v. *Blackburn*, 26 Beav. 41.
(*g*) *Hadow* v. *H.*, 9 Sim. 438.
(*h*) *Hora* v. *H.*, 33 Beav. 88; *Raikes* v. *Ward*, 1 Ha. 450.
(*i*) *Berry* v. *Bryant*, 2 Dr. & Sm. 1.
(*k*) *Talbot* v. *Marshman*, 3 Ch. 622. See *Jackson* v. *Parrott*, (1896) 1 Ch. 281; 65 L. J. Ch. 281.
(*l*) *Bryant* v. *Hickley*, (1894) 1 Ch. 324; 63 L. J. Ch. 197.

ing an infant's property for his maintenance and education was given by Lord Cranworth's Act (*m*). And by 44 & 45 Vict. c. 41, s. 43, it is enacted, that where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previous to his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian (if any), or otherwise apply for or towards the infant's maintenance and education, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any other person bound by law to provide for the infant's maintenance or education, or not. This power may be excluded by the expression of a contrary intention in the instrument conferring the infant's interest (*n*), but the section applies whether the instrument comes into operation before or after the commencement of the Act.

44 & 45 Vict. c. 41, s. 43.

The power of maintenance thus given does not apply to property, the vesting of which is or may be postponed beyond the age of twenty-one years (*o*). Lord Cranworth's Act conferred no power to allow maintenance where the infant would not in any event become entitled to the income. Thus where a legacy was given to a child contingently on his attaining twenty-one, but the income was meanwhile to be accumulated as part of the residuary personal estate, maintenance could not be allowed thereout, since the child was not even contingently entitled to the income (*p*). And the same holds good under the present Act (*q*). But if the legacy is directed to be set apart for the benefit of the legatees, whether it be specific or pecuniary, the income may be applied for maintenance (*r*).

Effects of the statutory power.

(*m*) 23 & 24 Vict. c. 145, s. 26.
(*n*) *Re Thatcher's Trusts*, 26 Ch. D. 426; 53 L. J. Ch. 1050.
(*o*) *Re Judkin's Trusts*, 25 Ch. D. 743; 53 L. J. Ch. 496; *Re Breed's Will*, 1 Ch. D. 228.
(*p*) *Re George*, 5 Ch. D. 837.
(*q*) *Re Judkin's Trusts, sup.*; *Re Dickson*, 29 Ch. D. 331; 28 *ib.* 291; 54 L. J. Ch. 510.
(*r*) *Clements* v. *Pearsall*, (1894) 1 Ch. 665; 63 L. J. Ch. 326; *Woodin*

The effect of the Act has been thus summarised: Where the income will go along with the capital if and when the capital vests, then the income is applicable for maintenance, otherwise not (*s*); and the Court of Appeal has held (*t*) that where there is a gift to several persons contingently on attaining twenty-one the member of the class who first attains twenty-one does not become entitled to the income of the whole fund, but those under twenty-one can still be maintained out of the income of their contingent shares (*u*).

Maintenance directed by the Court. Out of what fund.

(4.) In the absence of any such power, directory or statutory, the Court has been wont to allow as maintenance the rents, profits, or income of real or personal property which is vested in possession in an infant (*x*); and if it be so vested, maintenance may be allowed, notwithstanding that it is liable to be divested by a condition subsequent (*y*).

Maintenance cannot usually be given out of a vested legacy payable at a future day, since it does not carry interest until that time (*z*); still less where there is a prior express trust for accumulation (*a*). But to these rules there is this important exception, namely, that if a parent or person *in loco parentis* leaves to a child or to children as a class a vested legacy payable *in futuro*, or a contingent legacy, and the child or children is or are otherwise unprovided for, the interest will be allowed as maintenance, from the death of the testator (*b*). But maintenance will

v. *Glass*, (1895) 2 Ch. 309; 64 L. J. Ch. 501; *Henderson-Roe* v. *Hitchens*, 42 Ch. D. 302; 58 L. J. Ch. 860.

(*s*) Wolstenholme's C. A. ed. 7, p. 100.

(*t*) *Holford* v. *H.*, (1894) 3 Ch. 30; 63 L. J. Ch. 637, overruling *Burt* v. *Arnold*, (1891) 1 Ch. 671; 60 L. J. Ch. 470.

(*u*) See also *Adams* v. *A.*, (1893) 1 Ch. 329; 62 L. J. Ch. 266; *Arnold* v. *Burt*, (1895) 2 Ch. 577; 64 L. J. Ch. 830.

(*x*) *Dormer* v. *D.*, Rep. t. Finch, 432; *Re Howarth*, 8 Ch. 415; but see *Cadman* v. *C.*, 33 Ch. D. 397; 55 L. J. Ch. 833.

(*y*) *Taylor* v. *Johnson*, 2 P. Wms. 504.

(*z*) *Descrampes* v. *Tompkins*, 4 Bro. C. C. 149, n.; *Crickett* v. *Dolby*, 3 Ves. 10.

(*a*) *Butler* v. *Freeman*, 3 Atk. 58; *Hunt* v. *Parry*, 32 Ch. D. 383; 55 L. J. Ch. 659.

(*b*) *Inchedon* v. *Northcote*, 3 Atk. 438; *Brown* v. *Temperley*, 3 Russ. 263; *Havelock* v. *H.*, 17 Ch. D.

not be so allowed if the testator has made an independent provision for it (*b*).

The Court will only in extreme cases resort to or authorise the employment of an infant's capital for its maintenance (*c*).

2. *In what circumstances maintenance will be directed.*

When directed under the statute, discretion of trustees.

In both Lord Cranworth's Act (*d*) and 44 & 45 Vict. c. 41, the granting or withholding of maintenance is expressed to be "at the sole discretion" of the trustees; and it was decided that they might pay it to the infant's father, who as natural guardian was held to come within the words of the Act (*e*). The present Act expressly provides for such a case, but, as before, it appears that the Court will not interfere with the discretion of trustees which is honestly exercised (*f*).

Apart from statute, maintenance not allowed to father.

In cases not within the Act, the Court has acted on the principle that the father is bound to maintain his children, and has accordingly refused to allow maintenance out of *their* property, except in cases where the father has been unable to provide for them in a manner suited to their fortune and position (*g*).

Exception; settled fund.

But if the property in question is the subject of a marriage settlement, the trusts of which are a matter of contract, then if the settlement contains a *trust* for maintenance, a father is entitled to receive a proper sum for the purpose, without reference to his ability (*h*). A mere

807; 50 L. J. Ch. 778; *Collins* v. *C.*, 32 Ch. D. 229; 55 L. J. Ch. 672.

(*b*) See note (*b*), *ante*, p. 460.

(*c*) *Davies* v. *Austin*, 1 Ves. jr. 247; *Walker* v. *Wetherell*, 6 Ves. 473; *Barlow* v. *Grant*, 1 Vern. 255; *Re Tuer's Will Trusts*, 32 Ch. D. 39; 55 L. J. Ch. 454.

(*d*) *Supra*, p. 459.

(*e*) *Re Cotton*, 1 Ch. D. 232.

(*f*) *Re Lofthouse*, 29 Ch. D. 921; 54 L. J. Ch. 1087; *Bryant* v. *Hickley*, (1894) 1 Ch. 324; 63 L. J. Ch. 197.

(*g*) *Fawkner* v. *Watts*, 1 Atk. 408; *Mundy* v. *Howe*, 4 Bro. C. C. 224; *Havelock* v. *H.*, *sup.*

(*h*) *Mundy* v. *Howe*, *sup.*; *Ransome* v. *Burgess*, 3 Eq. 773; *Thompson* v. *Griffin*, Cr. & Ph. 317.

power so to apply the income is not, however, sufficient to entitle the father to this (*i*).

Widow is entitled.

A married woman having separate estate is now legally liable for the maintenance of her children, and might therefore, perhaps, be considered to fall within the same rules (*k*); but a widow has been held entitled to maintenance for her children without reference to her ability, whether remaining unmarried (*l*), or marrying again (*m*).

Condition of whole family considered.

In deciding as to the necessity for maintenance, and its amount, the Court will consider the state and condition of the whole family (*n*), as well as the circumstances of the parents (*o*), so as to enable an elder son to provide for his brothers and sisters, or a child to minister to the comforts and necessities of its father and mother.

Distinction between past and future maintenance.

In questions of future maintenance, of course the principal considerations are the extent of the fund and the position in life of the infant; but whatever these may be, in allowing for past maintenance, only that which has been actually and properly expended will be repaid (*p*).

III. *Advancement.*

Advancement distinguished from maintenance.

For maintenance, as we have seen, the capital of an infant can rarely be resorted to. But in many cases it is evidently to his interest that his capital should to some extent, or even entirely, be laid out for the purpose of providing an occupation for him in the world. Such an application of capital is termed *advancement*, and is subject

(*i*) *Wilson* v. *Turner*, 22 Ch. D. 521; 52 L. J. Ch. 270.

(*k*) 45 & 46 Vict. c. 75, s. 21.

(*l*) *Lanoy* v. *D. of Athol*, 2 Atk. 447; see *Barnes* v. *Ross*, (1896) A. C. 625.

(*m*) *Greenwell* v. *G.*, 5 Ves. 194; *Douglas* v. *Andrews*, 12 Beav. 310.

(*n*) *Pierrepont* v. *Cheney*, 1 P. Wms. 493.

(*o*) *Roach* v. *Garvan*, 1 Ves. sr. 160.

(*p*) *Bruin* v. *Knott*, 1 Ph. 572.

to rules quite different from those regulating payments for maintenance and education.

1. *Where there is an express power of advancement.*

Under express power.

Very frequently the instrument conferring property on an infant contains a power expressly authorising advancement. Where this is the case the terms of the power must be strictly complied with (*q*), and if it prescribes the amount which may be so disposed of, that amount cannot be exceeded, unless, at least, the person to be advanced is absolutely entitled to the fund, or the persons entitled in default consent to the application (*r*). If the power is discretionary, the Court will not usually interfere with its exercise (*s*), unless, indeed, the trustees wholly refuse to act or to exercise their discretion (*t*), or exercise it in what is not a *bonâ fide* manner (*u*).

Power to be strictly followed.

What comprised in advancement.

A wide construction is put upon the words "advancement or preferment." They have been held to warrant the purchase of a commission in the army (*x*), apprenticing in the mercantile navy (*y*), the making of marriage settlements (*z*), payment of the expenses of emigration (*a*), and payment for plant and machinery for the purpose of starting a child in business (*b*).

Limited power.

But if a power of advancement is given for a limited purpose—*e.g.*, to buy a commission in the army—and that purpose becomes impossible of execution, the power (differing in this from a bequest for a special purpose) cannot be exercised in any other way (*c*).

(*q*) *Palmer* v. *Wakefield*, 3 Beav. 227.
(*r*) *Therry* v. *Henderson*, 15 L. T. 452.
(*s*) *Livesey* v. *Harding*, Taml. 460; *French* v. *Davidson*, 3 Mad. 396.
(*t*) *Lewis* v. *L.*, 1 Cox, 162.
(*u*) *Molyneux* v. *Fletcher*, (1898) 1 Q. B. 648; 67 L. J. Q. B. 392.
(*x*) *Cope* v. *Wilmot*, 1 Coll. 396, n.
(*y*) *Warr* v. *W.*, Prec. Ch. 12, 13.
(*z*) *Lloyd* v. *Cocker*, 27 Beav. 645; *Roper-Curzon* v. *R.*, 11 Eq. 452.
(*a*) *Re Long*, 38 L. J. Ch. 125.
(*b*) *Taylor* v. *T.*, 20 Eq. 155; and see *Re Blockley*, 29 Ch. D. 250; 54 L. J. Ch. 722.
(*c*) *Re Ward's Tr.*, 7 Ch. 727.

2. *Where there is no express power.*

Authority of Court required in absence of a power.

In the absence of an express power, trustees can only advance an infant at their own risk, since they will not be allowed the sum paid unless the Court approves (*d*). It is always, therefore, desirable in the first place to seek the authority of the Court.

The purposes for which the Court will authorise advancement are similar to those mentioned in the last section (*e*), and need no further illustration.

Out of what funds allowed.

As a rule, advancement can only be made out of a fund to which the infant is absolutely entitled, but it has been sanctioned in the case of equal legacies to a class with an equal chance of survivorship, after the analogy of maintenance under similar circumstances (*f*). Where, however, there is a limitation over to third parties, trustees can never safely, nor will the Court, break in upon the capital for any purpose, without the consent of those parties (*g*).

Advancement not allowed to father.

It being a father's duty to advance as well as to maintain his children, he will not be allowed to repay himself what he has advanced, out of the property of his child (*h*); and it is doubtful whether the same would not apply to a mother (*i*); but an advancement will clearly be made for the child if the father is unable to do it (*k*).

NOTE.

Jurisdiction as to Lunatics.

This is a convenient place in which to mention a matter which does not, strictly speaking, fall within the limits of

(*d*) *Lee* v. *Brown*, 4 Ves. 362, 368.

(*e*) *Evans* v. *Massey*, 1 Y. & J. 196; *Franklin* v. *Green*, 2 Vern. 137; *Walsh* v. *W.*, 1 Drew. 64.

(*f*) *Franklin* v. *Green*, *sup.* And see *Jee* v. *Audley*, 1 Cox, 324; *Re Lowman*, (1895) 2 Ch. 348; 64 L. J. Ch. 567; *Michell* v. *Loe*, (1898) 2 Ch. 567; 67 L. J. Ch. 662.

(*g*) *Lee* v. *Brown*, *sup.*; *Evans* v. *Massey*, *sup.*

(*h*) *Darley* v. *D.*, 3 Atk. 397.

(*i*) *Smee* v. *Martin*, Bunb. 136.

(*k*) *Exp. Hays*, 3 De G. J. & S. 485; *Re Lane*, 17 Jur. 219.

this work—namely, the jurisdiction exercised by the Lord Chancellor and Lords Justices over the persons and property of lunatics or persons of unsound mind.

Jurisdiction as to lunatics not in Chancery, but delegated by the Crown to the Lord Chancellor.

The student cannot be too strongly reminded that this subject formed no part of the jurisdiction of the High Court of Chancery, nor is it now exercised by the Chancery Division of the High Court of Justice. The Crown, by virtue of its prerogative, has the right to assume the care and custody of the persons and estates of those who are of unsound mind. For the purpose of its exercise, the Crown by sign manual delegated its authority usually to the Lord Chancellor, as its highest judicial officer, not, however, *ex officio* as president of the High Court of Chancery. In 1851 the Lords Justices were appointed to constitute a Court of Appeal in Chancery, with all the original and other jurisdiction of the Lord Chancellor in the Court of Chancery (*l*); and shortly afterwards they were entrusted by a warrant under the Queen's sign manual with the care and custody of lunatics. On the passing of the Lunacy Regulation Act (*m*) in 1853, this jurisdiction was confirmed and continued concurrently with that of the Lord Chancellor. By the Judicature Act, 1875 (*n*), s. 7, it is enacted that "Any jurisdiction usually vested in the Lords Justices "of Appeal in Chancery, or either of them, in relation to "the persons and estates of idiots, lunatics and persons of "unsound mind, shall be exercised by such judge or "judges of the High Court of Justice or Court of Appeal "as may be entrusted by the sign manual of Her Majesty "or her successors with the care and commitment of the "custody of such persons and estates."

Lords Justices.

16 & 17 Vict. c. 70.

Thus from the earliest times down to the present, the jurisdiction in lunacy of certain judges appointed for that purpose by the Crown has been and is something perfectly distinct from the jurisdiction of the Courts of Chancery or

(*l*) 14 & 15 Vict. c. 83, s. 5. (*m*) 16 & 17 Vict. c. 70.
(*n*) 38 & 39 Vict. c. 77.

of the Chancery Division, and this distinction is illustrated by the fact that in matters of lunacy the appeal from the Lords Justices lies, not to the House of Lords, but to Her Majesty in Council, or, in other words, to the Judicial Committee of the Privy Council (*o*). If further illustration is required it is well afforded by the case of *Beall* v. *Smith* (*p*), where after the institution of a Chancery suit for the purpose of winding up the business of a person of unsound mind not so found by inquisition, an inquisition was granted on petition in lunacy, a verdict of lunacy obtained thereon, and a committee appointed. Further proceedings having been taken in the Chancery suit after this, it was held by the Lords Justices that all such proceedings should be set aside as a contempt upon the jurisdiction in lunacy (*q*).

Beall v. *Smith.*

Unsoundness of mind does not affect jurisdiction of Chancery.

The fact, then, that a person is of unsound mind has, until he is so found by inquisition, no effect whatever on the jurisdiction of the Chancery Division. In itself it neither creates nor destroys any power to deal with such a person or his property. But when, on inquisition held at the direction of the Court in lunacy, a verdict has been found, and a committee appointed, such committee becomes an officer of the Court, and as such a delegate of the prerogative of the Crown. From that time forward the affairs of the lunatic are under the direction of the Court of Lunacy; in it all proceedings respecting the lunatic's person or estate must be taken; and, as we have seen, the Courts of Chancery have then no longer power to interfere therewith, except under the direction of the judges in lunacy. The procedure in lunacy matters is now regulated by the Lunacy Act, 1890 (*r*), which repeals and re-enacts with certain variations the similar provisions contained in the Lunacy Regulation Act, 1853 (*s*).

(*o*) Jud. Act, 1873, s. 18.

(*p*) 9 Ch. 85.

(*q*) See *Re George Armstrong & Sons*, (1896) 1 Ch. 536; 65 L. J. Ch. 258.

(*r*) 53 Vict. c. 5, ss. 116 *et seq.*

(*s*) *Supra*, p. 465.

Court of Lunacy administrative.

If inquiry be made as to the principles which guide the jurisdiction of the Court in cases of lunacy, the answer may here be very brief. The function of the Court is purely administrative, and the sole and constant aim and object of attention in the administration is the interest of the lunatic himself (*t*); and to this the rights of his creditors are subordinate (*u*), save that the Court will not interfere with property which has actually come into the possession of the lunatic's trustee in bankruptcy or judgment creditor (*x*). The Court sometimes makes allowances out of the lunatic's property to his near relations, where this will tend indirectly to the lunatic's benefit (*y*), but it does not readily do so (*z*). In dealing with the lunatic's property, though the Court will not unnecessarily alter the state of the property, it will not suffer itself to be hampered by considering the interests of the real or personal representatives claiming through him; and if, as is elsewhere seen, a conversion is necessary for his interest, there is no equity as between the representatives giving a right on either side to claim a reconversion (*a*). Under the existing statute the Court has a very free jurisdiction as to exercising or directing the exercise on his behalf of the powers of a lunatic, statutory or otherwise, as to which reference may be made to the cases below cited. Of course in all such cases, as in the others referred to, the ruling principle is the interest of the lunatic himself (*b*).

It would be inappropriate here to enter into any

(*t*) *Oxenden* v. *Compton*, 2 Ves. jr. 72; *Exp. Phillips*, 19 Ves. 118.

(*u*) See *Re Farnham*, (1895) 2 Ch. 799; (1896) 1 Ch. 836; 65 L. J. Ch. 456; *Re Plenderleith*, (1893) 3 Ch. 332; 62 L. J. Ch. 993; *Re Winkle*, (1894) 2 Ch. 519; 63 L. J. Ch. 541.

(*x*) *Re Clarke*, (1898) 1 Ch. 336; 67 L. J. Ch. 234.

(*y*) *Re Sparrow*, 20 Ch. D. 320; 51 L. J. Ch. 497; *Re Weld*, 20 Ch. D. 451.

(*z*) *Re Darling*, 39 Ch. D. 208; 57 L. J. Ch. 891.

(*a*) Page 504.

(*b*) *Re Earl of Sefton*, (1898) 2 Ch. 378; 67 L. J. Ch. 518; *Re Salt*, (1896) 1 Ch. 117; 65 L. J. Ch. 152; *Re Ray*, (1896) 1 Ch. 468; 65 L. J. Ch. 316; *Re X.*, (1894) 2 Ch. 415; 63 L. J. Ch. 613.

examination of the practice of the administration in lunacy, such a subject being foreign to the scope and purpose of this work. Reference, however, may be made to the Act already mentioned (*c*), as being the foundation of the procedure as at present followed.

(*c*) 53 Vict. c. 5.

CHAPTER IX.

ELECTION, CONVERSION, SATISFACTION, AND PERFORMANCE.

It is a matter of some difficulty to determine the proper place to assign to the subject-matter of this chapter in our classification. In some respects the doctrines of election, conversion, satisfaction, and performance might be conveniently treated under the heading of Administration, since it is almost exclusively in the working out of the administration of estates that the questions which they involve arise. With almost equal propriety they might have found a place under the heading of Trusts, since effect is generally given to them by the application of the theory of Trusts. But it would have greatly encumbered those subjects, already sufficiently comprehensive, to have added so much matter as is necessary for the proper elucidation of the doctrines now in view. On the whole, therefore, it has been thought best, though it may, perhaps, involve some sacrifice of logical precision, to assign a separate chapter to these peculiarly equitable principles. Their relation to the other branches of the subject which we have mentioned will be sufficiently manifest to prevent any confusion resulting from their isolated treatment; while the near relation of these matters *inter se* affords an additional warrant for presenting them to the reader in as close a connexion as possible.

Section I.—Election.

I. *General Principle.*
II. *Conditions of Election.*
III. *Election under exercise of Powers.*
IV. *Miscellaneous Cases.*
V. *Mode of effecting Election.*
VI. *Effects of Election.*

Definition.

Election may be defined as the equitable accommodation of two inconsistent or contradictory bequests or benefits, one of which the donor has, strictly speaking, no power to bestow without the consent or co-operation of the donee of the other. The practical application of the doctrine affords a remarkable example of that disregard of the forms of legality to which we have before alluded. That a devise by A. to B. of property belonging to C. should be carried out by any device, legal or equitable, may at first strike the student as almost unintelligible. Examples will show how this result is effected.

One of the most important cases by which the doctrine of election has been established is that of *Noys* v. *Mordaunt* (*a*), in which the facts were as follows:—John Everard, having two daughters, made his will, devising and bequeathing to Margaret, his eldest daughter, £800 in money and his lands in Beeston, which, under the settlement made on the testator's marriage, would have

(*a*) 2 Vern. 581; 1 W. & T. L. C. 367.

descended to the two daughters in equal shares as coparceners. He also gave to Mary, his second daughter, his lands in Stanborn and £1,300 in money, provided, and on condition, that she released, conveyed, and assured Beeston lands to her sister Margaret. Provided, if he should have another daughter, then he gave the £800 devised to Margaret to such after-born daughter; and the lands at Stanborn and the £1,300 devised to Mary to the said Mary and such after-born daughter equally between them.

Another daughter, Elizabeth, was born shortly after his death. Mary married Higgs, and died without issue, without having given any release to Margaret, as required by the will.

Elizabeth claimed not only the lands devised to her by the will, and a moiety of what was devised to Mary, but also a moiety of the Beeston lands devised to Margaret. The question was whether she should be at liberty so to do, or ought not either to acquiesce in the will or renounce any benefit thereby.

Lord Keeper Cowper said that in all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee simple lands, and to another lands entailed or under settlement, it is upon an implied condition that each party quit and release the other.

I. *General Principle.*

1. The simplest illustration of the well-known equitable principle of election may be given in the following form:— If A. gives to B. by will or deed property belonging to C., and by the same instrument gives property belonging to himself to C., then a Court of equity will allow C. to take Illustration.

the gift made to him by A. only upon the condition of his conforming to the instrument by giving up his own property to B. He must choose or *elect* whether he will keep his own property and forego the gift, or will accept the gift and give effect to the benefit intended for B. by giving up his property.

Contrast of English and Roman doctrine.

2. This doctrine rests on the ground that it is inequitable for a beneficiary at the same time to receive a benefit from a donor and refuse to give effect as far as possible to the donor's manifest intention. The limitations to which it is subject in application will presently be seen. In two important particulars the English doctrine of election differs from the corresponding principle in Roman law from which it is probably derived. First, whereas the Roman prætors only applied it in the case of testamentary dispositions, in English Courts of equity it affects equally dispositions by will and dispositions by deed *inter vivos* (*b*). Secondly, no case of election arose in Roman law where a testator made a bequest of the property of a person under the erroneous supposition that it belonged to himself. Such a bequest was considered void, and the property so referred to might be retained by the person whose it was, while at the same time he received a benefit under the same will. In English equity, however, it is immaterial whether a donor intentionally or under a misapprehension affects to give property belonging to another person. In either case the person whose property is thus dealt with must conform to the instrument if he would receive a benefit under it (*c*). This may perhaps be less logically consistent than the Roman rule, but it has the manifest advantage of avoiding the necessity of an inquiry, which is often likely to be exceedingly difficult, as to the degree of knowledge existing in the mind of the donor.

(*b*) *Llewellyn* v. *Mackworth*, Barn. Ch. 445; *Green* v. *G.*, 2 Mer. 86.
(*c*) *Whistler* v. *Webster*, 2 Ves. 370; *Griffith-Boscawen* v. *Scott*, 26 Ch. D. 358.

3. If, in circumstances which give rise to the doctrine of election, the beneficiary elects to conform to the instrument and part with his own property, no question arises. But it is, of course, quite open to him to elect against an instrument which can have no intrinsic power to deprive him of what is his own. It was for some time a question what was the consequence of such an election. In many cases it was held that by refusing to comply with the donor's expressed intention, a person entirely forfeited the benefit which the donor conditionally bestowed upon him (*d*). On the contrary, by the well-known case of *Streatfield* v. *Streatfield* (*e*), followed by a long line of authorities, it has now been established that forfeiture does not result from such non-compliance, and that all that is required from the beneficiary is to make or allow compensation to the person who is disappointed by his election (*f*). Illustration will, perhaps, make this clearer. If, then, A. gives to B. an estate which belongs to C., and is worth £10,000, and at the same time gives to C. a legacy of £20,000, C., by refusing to part with his estate, will not forfeit the whole of his legacy, but may receive £10,000 thereof, the remaining £10,000 being paid to B. as a compensation for his disappointment in not receiving the estate which was intended for him. The result of the cases has been thus summed up:—

Compensation, not forfeiture, the rule.

Streatfield v. *S.*

"Firstly: In the event of election to take against the instrument, Courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation for those whom his election disappoints.

"Secondly: The surplus after compensation does not devolve as undisposed of, but is restored to the donee, the

(*d*) *Cowper* v. *Scott*, 3 P. Wms. 124; *Cookes* v. *Hellier*, 1 Ves. sr. 235.

(*e*) Ca. t. Talb. 176.

(*f*) *Gretton* v. *Haward*, 1 Swanst. 433; *Padbury* v. *Clark*, 2 Mac. & G. 298; *Rogers* v. *Jones*, 3 Ch. D. 688; *Hamilton* v. *H.*, (1892) 1 Ch. 396; 61 L. J. Ch. 220; *Haynes* v. *Foster*, (1901) 1 Ch. 361; 70 L. J. Ch. 302.

purpose being satisfied for which alone the Court controlled his legal right" (*g*).

II. *Conditions of Election.*

Such being the general character of the doctrine, it is now necessary to examine more minutely what circumstances are necessary in order to call it into operation, or to justify its application.

Intention of donor must be clear.

1. There must appear in the instrument itself a clear intention on the part of the donor to dispose of what is not his own (*h*); and, as has been mentioned, if there is such a clear intention, it is immaterial whether he knew the property not to be his own, or erroneously conceived it to be so (*i*).

Where testator has a partial interest.

There is often, however, considerable difficulty in ascertaining precisely what the intention of the instrument is. Thus, if a testator has a partial interest in the property dealt with, it will often be doubtful whether his language is designed to refer to the whole property, and so to affect the interest of another person, or whether it is to be confined to his own partial interest only. In these circumstances the general tendency of the Court is to consider the words as applying only to his own actual interest, and, therefore, against the supposition of an intended election (*j*); but if there is shown a clear intention to pass the entirety, effect will be given to it; and if the owner of the other part takes other benefits by the will, he will be put to his election (*k*).

(*g*) Mr. Swanston's note in *Gretton* v. *Haward*, 1 Swanst. 433.
(*h*) *Forrester* v. *Cotton*, 1 Eden, 531; *Dillon* v. *Parker*, 1 Swanst. 359; Jac. 505.
(*i*) *Thelluson* v. *Woodford*, 13 Ves. 221; *Coutts* v. *Ackworth*, 9 Eq. 519.
(*j*) *Maddison* v. *Chapman*, 1 J. & H. 470; *Re Bidwell's Settmt.*, 11 W. R. 161.
(*k*) *Padbury* v. *Clark*, 2 Mac. & G. 298; *Wilkinson* v. *Dent*, 6 Ch. 339.

General devise not extended by extrinsic evidence;

but may by intrinsic evidence.

Again, a mere general devise or bequest will only comprehend property of which the devisor is owner, and extrinsic evidence is not admissible to show that a testator considered property to be his own which was not so, and thus intended to comprise it in his general devise or bequest (*l*). But the will itself may show such an intention to include in a general expression property not his own as to give rise to a case of election. Thus, an heir in tail has been put to his election by a devise which included an estate tail (*m*), the words used being, "all my real estates" and "all the lands occupied by me." "If," said Sir John Romilly, in that case, "a testator says, 'I give all the property I have in the world to A. B.,' and he leaves a large legacy to his heir in tail, that will not raise a case of election against such heir, because that testator only gives what he has;" but it is otherwise when "there is an intention shown on the face of the will to dispose of the entailed estate away from the heir in tail."

There must be a fund available for compensation.

2. As the doctrine of election depends upon compensation, it will not be applicable unless there be an available fund from which compensation can be made. In other words, there will be no ground for election unless the testator or settlor bestows some property actually and absolutely his own on the person who is required to elect.

Appointments under powers.

This limitation of the principle is most frequently illustrated by cases in which benefits are conferred by the exercise of powers of appointment. A fund over which a person has a mere power of appointment, there being a gift over on default of the exercise of the power, is not the absolute property of the donee of the power. Therefore, where a person under a power to appoint among children made an appointment contrary to the terms of the power, a child entitled in default of appointment was allowed to

(*l*) *Blake* v. *Bunbury*, 1 Ves. 523; *Stratton* v. *Best*, 1 Ves. jr. 285; *Clementson* v. *Gandy*, 1 Kee. 309.

(*m*) *Honywood* v. *Forster*, 30 Beav. 14; *Beauclerk* v. *James*, 34 Ch. D. 160; 56 L. J. Ch. 82.

set it aside, notwithstanding that a share had, by the same instrument, been appointed to him (*n*). He was not required to elect, because there was no free disposable property of the appointor given to him which could be laid hold of to compensate the person disappointed. So where a testator had an exclusive power of appointment over an estate to his children and grandchildren, and an exclusive power to appoint a fund to his children only, and he appointed the estate to some of his children, and the fund to his children *and a grandchild*, the children were not called upon to elect in favour of the grandchild, the appointment to whom was *ultra vires;* no property of the testator's own having been given to them by the will (*o*).

Nor can the doctrine of election be applied where the property belonging to the donee is property which he has no power to assign, such as an equitable life estate in heirlooms before the Settled Land Act, 1882 (*p*).

No election between two claims arising under the same instrument.

3. There is no case for election between two or more separate dispositions contained in one instrument. In other words, election only applies between a gift given by some instrument, and a claim *dehors* that instrument (*q*). Thus, a testatrix who had a power to appoint a fund in favour of her children, who were not *in esse* at the time of the creation of the power, appointed by her will a portion thereof to her son for life, with remainder as he should by will appoint; and there followed a general residuary appointment of the settled fund, subject to all other appointments, to her daughters, to whom benefits out of the testatrix's own property were at the same time given. It was held that the appointment in favour of the appointees of the son was void for remoteness. That portion,

(*n*) *Bristowe* v. *Ward*, 2 Ves. 336.

(*o*) *In re Fowler's Trust*, 27 Beav. 362.

(*p*) *Cavendish* v. *Dacre*, 31 Ch. D. 466; 55 L. J. Ch. 401; and see *Re Vardon's Trusts*, 31 Ch. D. 275; 55 L. J. Ch. 259; *Carter* v. *Silber*, (1892) 2 Ch. 278; 61 L. J. Ch. 401; *Edwards* v. *Carter*, (1893) A. C. 360; 63 L. J. Ch. 100.

(*q*) *Cavendish* v. *Dacre*, *sup.*

therefore, passed under the residuary appointment to the daughters. It was then argued that as the daughters received independent gifts from the testatrix, the appointees of the son could put them to their election between such gifts and the fund accruing to them in consequence of the previous decision; but it was decided that there was no case for election, both claims arising from the same instrument (*r*).

Beneficial and onerous bequests.

On a similar principle, when by a will two distinct gifts are made to the same person, one of which is onerous and the other beneficial, the donee is not required to elect whether he will accept both or neither. He may, if he pleases, accept the benefit and reject the burden (*s*). But if the onerous and the beneficial property are included in the same gift, the acceptance of the burden is *primâ facie* deemed to be a condition of the benefit, and the donee must elect to take the whole gift or none of it (*t*).

Election not applicable to debts.

4. Election only applies in cases of bounty, not to cases of debt. If, therefore, there is a devise to creditors for the payment of their debts, they can accept the benefit of it without any prejudice to their legal rights against other funds disposed of by the will (*u*). Such was the law before real property was liable to all debts. Since 3 & 4 Will. IV. c. 104, general creditors having a right to proceed against all the property of the deceased, such questions can rarely arise.

The principle of election is in itself sufficiently simple and clear, but its application in the ever varying circumstances of practice often involves questions of considerable difficulty. It is only possible here to add as a further

(*r*) *Wollaston* v. *King*, 8 Eq. 165; *Wallinger* v. *W.*, 9 Eq. 301.

(*s*) *Andrew* v. *Trinity Hall*, 9 Ves. 525.

(*t*) *Guthrie* v. *Walrond*, 22 Ch. D. 573; 52 L. J. Ch. 165; *Re Hotchkys*, 32 Ch. D. 408; 55 L. J. Ch. 546; *Warren* v. *Rudall*, 1 J. & H. 13; *Frewen* v. *Law Life Soc.*, (1896) 2 Ch. 511; 65 L. J. Ch. 787; *Honywood* v. *H.*, (1902) 1 Ch. 347.

(*u*) *Kidney* v. *Coussmaker*, 12 Ves. 136; *Deg* v. *D.*, 2 P. Wms. 412.

illustration some notice of the leading classes of cases on which discussion has taken place.

III. *Election arising from the exercise of Powers.*

Appointment *ultra vires* and gift to person entitled in default.

1. We have already seen that no election is necessitated by an improper appointment under a power, where no free disposable property of the donor of the power is at the same time bestowed. If, however, an appointment is made to a person who is not an object of the power, and at the same time a gift of the donor's property is made to a person entitled in default of appointment, the principle of election applies. Here, the appointment itself being invalid, the property would naturally pass as if there had been no appointment, to the person entitled in default. But since an independent benefit has been conferred upon him by the same instrument, the conditions upon which the principle of election rests are precisely complied with; and he must either conform to the instrument by giving up his title to the appointed property, or if he insists on that, he will not be suffered to receive the gift conferred upon him (*x*).

Appointment with direction to transfer or attempts to modify.

2. But it will not suffice to raise a case of election, if after appointing to persons who are objects of the power, and at the same time giving them property of his own, the appointor directs them to settle the property on persons who are not objects of the power (*y*). In short, where there is an absolute appointment to an object of the power, followed by attempts to modify the interest so appointed in a manner which the law will not allow, the

(*x*) *Whistler* v. *Webster*, 2 Ves. jr. 367; *Beauclerk* v. *James*, 34 Ch. D. 160; 56 L. J. Ch. 82.

(*y*) *Carver* v. *Bowles*, 2 R. & M. 304; *Churchill* v. *C.*, 5 Eq. 44.

Court reads the instrument just as if such attempts had not been made (*z*). *A fortiori* merely precatory words, requesting appointees, objects of the power, to leave the fund appointed to others not objects of the power, will not put them to their election. A clause of forfeiture on non-compliance may, however, suffice to necessitate election (*a*).

Appointment *ultra vires* and gift to object of power.

3. If the donee of a power by the same instrument appoints to a stranger, and confers benefits out of his own property upon an object of the power, the position is different from that in which the appointment is made to the person entitled in default of appointment. The appointment being invalid, the property passes to the person entitled in default of appointment. He cannot be required to elect, because no gift of the appointor's property is made to him (*b*). Nor, it seems, can the object of the power be required to elect, because no part of the property subject to the appointment comes to him. It is, indeed, laid down in *Blacket* v. *Lamb* (*c*) that such an appointment would give rise to election; but it is submitted that this cannot be so, since the two funds in question never come to the same hand at all (*d*). Of course, if the same person is both object of the power and entitled in default of appointment, the case falls within the principle of *Whistler* v. *Webster* (*e*), already discussed, and he must elect between the gift and the fund which comes to him in consequence of the invalidity of the appointment.

4. Where there is an attempt by the instrumentality of a power to transgress the policy of the law—for instance, to evade the rule against perpetuities—the Court will

(*z*) *Woolridge* v. *W.*, John. 63; but see this case distinguished in *White* v. *W.*, 22 Ch. D. 555; 52 L. J. Ch. 232.

(*a*) *King* v. *K.*, 15 Ir. Ch. R. 479; *Boughton* v. *B.*, 2 Ves. sr. 12.

(*b*) *Swinburne* v. *Pitt*, 27 Ch. D. 696; 54 L. J. Ch. 229.

(*c*) 14 Beav. 482.

(*d*) See Farwell on Powers, p. 382 (ed. 2).

(*e*) *Sup.*

not aid such an attempt by applying the doctrine of election (*f*).

IV. *Miscellaneous Cases.*

1. Dower. Express words requiring election.

1. At law a widow might by express words be put to her election between her dower and a gift conferred upon her by will (*g*). In equity she may be put to her election by manifest implication, showing an intention of the donor to exclude her from dower (*h*). The principal questions which have arisen in this subject have been as to what amounts to a sufficient indication of intention to bar the legal right to dower.

Evidence of intention.

It was held that a devise to a widow of part of the lands of which she was dowable was not inconsistent with her claim to dower in the remainder (*i*), nor was the gift of an annuity or rent-charge charged upon the dower lands (*j*). But a direction which prescribed a mode of enjoyment inconsistent with the exercise of dower rights, was deemed sufficient evidence of intention to put her to her election. This was the case, for instance, where a power of leasing the dower lands was given to persons other than the widow (*k*), and when the widow was directed to pay rent (*l*).

Dower Act, 1833.

Since the Dower Act, 1833 (*m*), came into operation, cases as to election respecting dower have become of rare occurrence, dower being now so fully within the power of the husband. Thus by s. 9 thereof a devise of the land is,

(*f*) *Wollaston* v. *King*, 8 Eq. 165.
(*g*) *Gosling* v. *Warburton*, Cro. Eliz. 128; *Nottley* v. *Palmer*, 2 Drew. 93.
(*h*) *Birmingham* v. *Kirwan*, 2 S. & L. 452; *Hall* v. *Hill*, 1 Dr. & W. 94, 103.
(*i*) *Lawrence* v. *L.*, 2 Vern. 365.
(*j*) *Holdich* v. *H.*, 2 Y. & C. C. C. 19; *Harrison* v. *H.*, 1 Keen, 765.
(*k*) *O'Hara* v. *Chaine*, 1 J. & H. 662.
(*l*) *Birmingham* v. *Kirwan*, *sup.*
(*m*) 3 & 4 Will. IV. c. 105.

in the absence of indication of contrary intention, sufficient to bar dower (*n*). A gift of personalty, however, made to the widow, or of any land not subject to dower, will not prejudice her right unless a contrary intention is declared (*o*).

2. Devise to heir.

2. Although under the old law a devise to the heir was in a sense inoperative, inasmuch as he was held still to take by descent, and not by purchase as devisee, the leading case of *Noys* v. *Mordaunt* (*p*) decided that such a devise was a sufficient gift to raise a case of election between such property and other gifts conferred by the will, and this decision was consistently followed until by 3 & 4 Will. IV. c. 106, it was enacted that such devises should cause the land to pass to the heir as a purchaser. Since this statute there is, *à fortiori*, a case for election under such devises (*q*).

3. Imperfect wills.

3. Where there is a want of capacity to make an effectual will, or where the necessary formalities for the purpose are not complied with, effect will not be given to an invalid disposition by applying the doctrine of election; unless, indeed, the alternative gift is made by way of express condition.

Thus, prior to the Wills Act (*r*), when an infant whose will was valid as to personalty, but invalid as to real estate, gave a legacy to his heir-at-law, and devised his real estate to another person, the heir was not required to elect (*s*). And so where there was incapacity to make a will owing to coverture, as where a married woman, prior to the Married Women's Property Act, 1882 (*t*), made a valid appointment by will to her husband, affecting at the

(*n*) *Thomas* v. *Howell*, 34 Ch. D. 166; 56 L. J. Ch. 9. See *Rowland* v. *Cuthbertson*, 8 Eq. 466; *Lacey* v. *Hill*, 19 Eq. 346.

(*o*) Sect. 10.

(*p*) *Supra*, p. 470.

(*q*) *Schroder* v. *S.*, Kay, 578.

(*r*) 1 Vict. c. 26.

(*s*) *Hearle* v. *Greenbank*, 1 Atk. 715; and see *Sheddon* v. *Goodrich*, 8 Ves. 481; *Gardiner* v. *Fell*, 1 J. & W. 22; *Boughton* v. *B.*, 2 Ves. sr. 12; *Thelluson* v. *Woodford*, 13 Ves. 209.

(*t*) 45 & 46 Vict. c. 75.

same time to bequeath to another a fund not included in the power, there was no case for election, and the husband was entitled to take the bequeathed fund *jure mariti*, without foregoing the benefit of the appointment (*u*).

4. Derivative interests.

4. A person is not obliged to elect between benefits conferred upon him by an instrument, and an interest which he takes derivatively from another who has elected to take in opposition to the instrument. Thus, where a wife had elected to retain an estate tail against a will, which conferred benefits upon her husband, the husband was held entitled to curtesy in the estate (*x*). Nor is election required where a benefit is conferred by an instrument, and the recipient at the same time claims against the instrument but derivatively from the real owner, who received no benefit therefrom; for instance, where a gift is made to a husband in his own right, and his adverse claim is made as representative of his wife (*y*).

5. Qualified election.

5. Where special directions are given as to election, it may be confined to particular gifts, so as to prevent election as to other parts of the instrument. Thus, in *East* v. *Cook* (*z*) a testator devised property belonging to his eldest son to his second son, and amongst other gifts to the eldest son he gave him a piece a property which he stated to be in lieu of the piece of property which he purported to take away from him. The eldest son was held to be put to his election only as to those two pieces of property, so that he might retain his own without foregoing the other benefits conferred by the will (*a*).

6. Devise to co-owner.

6. If a testator who has an undivided interest in a particular property devises that property specifically to his

(*u*) *Rich* v. *Cockell*, 9 Ves. 369; *Re De Burgh-Lawson*, 34 W. R. 39.

(*x*) *Cavan* v. *Pulteney*, 2 Ves. 544; 3 *ib.* 384.

(*y*) *Grissell* v. *Swinhoe*, 7 Eq. 291; but see *Cooper* v. *C.*, 6 Ch. 21; L. R. 7 H. L. 53.

(*z*) 2 Ves. sr. 30.

(*a*) See *Wilkinson* v. *Dent*, 6 Ch. 339, 341; *Dummer* v. *Pitcher*, 2 My. & K. 262.

co-owner, the devisee must elect between his interest in the property and the interest he takes under the will. General words, however, would, as we have seen, be taken to apply only to the testator's own interest, and would not necessitate an election (*b*).

V. *Mode of effecting Election.*

Account may be required.

1. Persons who are put to their election are entitled to ascertain the respective values of their own property and of that conferred upon them, and may commence an action to have all requisite accounts taken (*c*). If, however, a cause relative to the same matter is already in existence, the necessary inquiries may be directed therein without the initiation of fresh proceedings (*d*). An election made under a mistake or in ignorance will not be binding (*e*).

2. Special rules apply to cases of election by persons under disability.

Election by infants.

Where an infant is required to elect, one of two courses is open. The election may, as in *Streatfield* v. *Streatfield* (*f*), be deferred until the attainment of full age. Or there may be an immediate reference to Chambers to inquire what course would be most beneficial to the infant (*g*). Sometimes an order has been made without such reference (*h*).

Married women.

The practice, also, as to election by married women has not been uniform. In some cases an inquiry has been directed as to what course is most beneficial, and they are required to elect within a limited time after the report (*i*).

(*b*) *Miller* v. *Thurgood*, 33 Beav. 496.
(*c*) *Buttricke* v. *Broadhurst*, 3 Bro. C. C. 88.
(*d*) *Douglas* v. *D.*, 12 Eq. 617.
(*e*) *Pusey* v. *Desbouvrie*, 3 P. Wms. 315; *Wake* v. *W.*, 3 Bro. C. C. 255.
(*f*) Ca. t. Talb. 176.
(*g*) *Bigland* v. *Huddlestone*, 3 Bro. C. C. 285, n.; *Ashburnham* v. *A.*, 13 Jur. 1111.
(*h*) *Lamb* v. *L.*, 5 W. R. 772.
(*i*) *Davis* v. *Page*, 9 Ves. 350; *Wilson* v. *Townsend*, 2 Ves. 693.

But with respect to separate estate free from a restraint on anticipation, marriage in no way restricts the power of election.

Implied election.

3. Election may be implied from circumstances, and there is often much difficulty in deciding as to what acts will amount to implied election. As we have seen, any such acts, to be binding on a person who is required to elect, must be done with a knowledge of his rights. They must also be done with a knowledge of the right to elect (*k*), and with an intention of electing (*l*). Mere continuance in receipt of the rents and profits of, or the exercise of acts of ownership over, both properties, by a person who has not been called upon to elect, cannot evidently be construed into an election to take one and reject the other (*m*).

Acquiescence.

Acquiescence in the enjoyment of one of the properties by other persons may be so long continued as to render it inequitable to disturb them on a plea of ignorance of rights (*n*); but no precise rule can be laid down to limit such time (*o*).

Time.

Where a specific time has, as in *Streatfield* v. *Streatfield* (*p*), been limited for election, a person who does not elect within such time will be deemed to have elected against the instrument.

VI. *The Effects of Election.*

Whom election binds generally.

1. Election, whether expressed or implied, by a person *sui juris* and absolutely entitled, of course binds all who

(*k*) *Briscoe* v. *B.*, 7 Ir. Eq. R. 123; 1 J. & L. 334.

(*l*) *Stratford* v. *Powell*, 1 Ball & B. 1; *Dillon* v. *Parker*, 1 Swanst. 380, 387; *Wilder* v. *Pigott*, 22 Ch. D. 263; 52 L. J. Ch. 141.

(*m*) *Padbury* v. *Clark*, 2 Mac. & G. 298.

(*n*) *Tibbits* v. *T.*, 19 Ves. 663; *Dewar* v. *Maitland*, 2 Eq. 834.

(*o*) See *Wake* v. *W.*, 3 Bro. C. C. 255; *Sopwith* v. *Maugham*, 30 Beav. 235.

(*p*) Ca. t. Talb. 176.

claim under him as well as himself. The election, however, of a person having a limited interest, will not bind others who are entitled in remainder (*q*), and each of the successive remaindermen has a separate right of election (*r*). Similarly each member of a class—for instance, next of kin—has a distinct right to elect; the majority cannot bind anyone (*s*).

Election by married woman.

2. Election by a married woman binds both her real and personal estate in the hands of her heirs and representatives (*t*), and may be effected without deed acknowledged (*u*). Where she has so elected the Court can order a conveyance to be made accordingly (*u*). Prior to 20 & 21 Vict. c. 57, a married woman could not elect to relinquish a reversionary interest in personalty (*x*), but there is now no reason why such a restriction should continue to exist (*y*). She cannot elect to part with property which is subject to a restraint on anticipation (*z*). But the Court has power to dispense with the restraint with her consent, when it appears to be for her benefit to do so (*a*).

20 & 21 Vict. c. 57.

(*q*) *Ward* v. *Baugh*, 4 Ves. 623; *E. of Northumberland* v. *E. of Aylesford*, Amb. 540, 657.

(*r*) 1 Swanst. 408, n.

(*s*) *Fytche* v. *F.*, 7 Eq. 494.

(*t*) *Ardesoife* v. *Bennet*, 2 Dick. 463.

(*u*) *Barrow* v. *B.*, 4 K. & J. 409.

(*x*) *Robinson* v. *Wheelwright*, 6 De G. M. & G. 535, 546.

(*y*) *Wilder* v. *Pigott*, *sup.* And now see *Greenhill* v. *N. B. Insce. Co.*, (1893) 3 Ch. 474; 62 L. J. Ch. 918; *Williams* v. *Knight*, (1894) 2 Ch. 421; 63 L. J. Ch. 609; *Harle* v. *Jarman*, (1895) 2 Ch. 419; 64 L. J. Ch. 779.

(*z*) *Smith* v. *Spence*, 27 Ch. D. 606; 54 L. J. Ch. 201; *Re Vardon's Trusts*, 31 Ch. D. 275, reversing 28 *ib.* 124; 55 L. J. Ch. 259; *Haynes* v. *Foster*, (1901) 1 Ch. 361; 70 L. J. Ch. 302.

(*a*) 44 & 45 Vict. c. 41, s. 39; *Hodges* v. *H.*, 20 Ch. D. 749; 51 L. J. Ch. 549.

Section II.—Conversion and Reconversion.

Conversion.

General Principle.

I. *How effected.*

II. *Effects of Conversion.*

III. *Time from which Conversion takes place.*

IV. *Effects of failure of purposes of Conversion.*

V. *Character of resulting property.*

Reconversion.

General Principles.

1. *Persons electing must be* sui juris.
2. *Election does not affect interests of others.*
3. *What amounts to election.*

Conversion.

Statement of the principle.

It is a familiar maxim that *equity looks upon that as done which ought to have been done.* There is no better illustration of the meaning of this than that supplied by the equitable doctrine of conversion, which is thus expressed by Sir Thomas Sewell in the leading case of *Fletcher* v. *Ashburner* (*a*) :—

" Money directed to be employed in the purchase of land, " and land directed to be sold and turned into money, are " to be considered as that species of property into which " they are directed to be converted; and this in whatever

(*a*) 1 Bro. C. C. 497; 1 W. & T. L. C. 896.

" manner the direction may be given—whether by will, " by way of contract, marriage articles, settlement, or " otherwise—and whether the money is actually deposited, " or only covenanted to be paid; whether the land is actu- " ally conveyed, or only agreed to be conveyed. The " owner of the fund or the contracting parties may make " land money or money land." These words are quoted and supported by Lord Alvanley in *Wheldale* v. *Partridge* (*b*).

The consequences of this doctrine are of very great interest and importance, and being often not a little intricate, they require full and careful consideration. The first inquiry naturally is, how conversion may be effected.

I. *Conversion, how effected.*

Conversion may arise either—(1) from the intention of the owner of the property in question; or (2) by the act of the Court; or (3) of third persons.

1. *Conversion arising by intention of the owner.*

Conversion by express intention.

The intention to effect a conversion may be either express or implied. An express direction needs no special consideration; and the leading case already quoted sufficiently illustrates the rule that a direction in a deed or will for the conversion of land into money or money into land will have the effect of impressing upon the property in equity the changed form intended.

Implied intention

But even without express direction conversion may be effected by a clear indication of intention—as, for instance, where a testator gives real estate together with personal estate to be divided into equal shares, and directs some of

(*b*) 5 Ves. 388, 396.

must be clear.

such shares to be invested in government funds (*c*). The intention must, however, be clearly apparent; mere ambiguous language will not suffice (*d*).

Optional powers of sale

Difficulty is often occasioned by the use of expressions which give to trustees an optional power of sale or investment. Generally speaking no conversion is effected unless the language is imperative. Thus a gift of money upon trust to lay out the same upon a purchase of lands *or* to put the same on good securities (*e*), or a devise of realty with a discretion to sell (*f*), will not effect conversion. The property will remain in the same state in which it is found. But where the direction is imperative, the bestowal of a discretion as to the time of the sale does not affect it; the conversion operates at once (*g*).

sometimes effect conversion.

In accordance with the rule that the intention of the party if discoverable is to prevail, there are cases in which language giving an apparent option has by the context been considered sufficiently imperative to effect conversion. This has been the case where, after a direction to lay out money in the purchase of land or other securities, words of limitation have been used which are applicable only to real estate (*h*). The same was held in *Earlom* v. *Saunders* (*i*), where Lord Hardwicke said :—"This Court never admits "trustees to have such election to change the right unless "it is expressly given to them. Here the money is to be "laid out in lands or securities for such uses as the land is "before settled. If it is laid out in securities (which are "personal) all the limitations might not take place. . . . . "The only way to make the clause consistent is that the "money be laid out on securities till lands are purchased, "and the interest and dividends in the meantime to go to "such persons as would be entitled to the land." Where

Earlom v. *Saunders.*

(*c*) *Mower* v. *Orr*, 7 Ha. 475.
(*d*) *Cornick* v. *Pearce*, 7 Ha. 477.
(*e*) *Curling* v. *May*, cited 3 Atk. 255.
(*f*) *Bourne* v. *B.*, 2 Ha. 35.
(*g*) *Morris* v. *Griffiths*, 26 Ch. D. 601; 53 L. J. Ch. 1051.
(*h*) *Cowley* v. *Harstonge*, 1 Dow, 361.
(*i*) Amb. 241.

trustees had an express option given to them to sell real property and to reinvest on realty or personalty, the new purchase to follow the same trusts, estates, and limitations as the original estate, and they sold and invested on mortgage, it was held that there was a conversion (*k*). The distinction apparently was that in the latter case the trustees had an express power of sale in the first instance, whereas in the former the money was given to them to invest on express limitations, so that their election was only as to temporary investment, not as to the general treatment of the fund.

Direction to convert on the request of third persons.

A somewhat similar distinction is taken when there is a direction to convert at the request of certain persons. If the words of request are merely inserted for the purpose of enforcing the obligation to convert, then, although conversion takes place without a request having been made, it will be considered to have been properly effected (*l*). It was there said: "Nothing is more common than to direct "money to be laid out upon request. The object of that "is only to ensure that the act shall be done when the "request is made, not to prevent it until request" (*m*). But if the words requiring the request or consent are inserted for the purpose of giving a discretion to the persons concerned, and then a sale takes place without such request, it will be considered improper, and there will be no conversion (*n*).

Partial conversion under discretionary power.

Where, again, a mere discretionary power to convert property is given to trustees, and only a partial conversion is made before the power is extinguished by the death of the trustees, the property must be taken as it is found by those entitled, according to its character (*o*). It is other-

(*k*) *Atwell* v. *A.*, 13 Eq. 23.
(*l*) *Thornton* v. *Hawley*, 10 Ves. 129.
(*m*) Per Sir W. Grant, M. R.
(*n*) *Davies* v. *Goodhew*, 6 Sim. 585.
(*o*) *Walter* v. *Maunde*, 19 Ves. 424; *Rich* v. *Whitfield*, 2 Eq. 583; *Pitman* v. *P.*, (1892) 1 Ch. 279; 61 L. J. Ch. 288.

wise in the case of an imperative power in the nature of a trust(*p*).

Express power of sale does not *ipso facto* convert.

Where from the nature of the transaction there is evidently no intention to convert, an express power of sale will not effect conversion.

E.g., mortgages.

This is the case in mortgages. The general intention of a mortgagor is to raise money, not to alter the condition or the mode of devolution of the property. On the death of a mortgagor, therefore, the equity of redemption devolves upon his heir or devisee, notwithstanding a power of sale in the mortgage, and a provision that the surplus moneys arising from a sale shall be paid to the mortgagor, his executors, or administrators. Thus if the sale does not take place till after the death of the mortgagor, his heir or devisee will be entitled to the money; though if the sale takes place in the mortgagor's lifetime the conversion will be complete, and the money will become the personal estate of the mortgagor (*q*). Again, if the trust for sale is for any reason void, for example, on the ground of remoteness, there is no conversion (*r*).

2. *By act of Court, or third parties.*

Conversion apart from the owner's intention.

There are also cases in which conversion takes place apart from any intention of the owner of the property.

In bankruptcy.

Thus if the real estate of a bankrupt is in his lifetime contracted to be sold, it is considered to be converted; and upon his death intestate his heir-at-law will not be entitled to it, or to any part of it not required for the satisfaction of his debts (*s*).

For benefit of lunatic

In the case of a lunatic, the Court will not generally alter the state of the property so as to affect his successors, but it may do so when it is for the benefit of the lunatic

(*p*) *Grieveson* v. *Kirsopp*, 2 Keen, 653.

(*q*) *Wright* v. *Rose*, 2 S. & S. 323.

(*r*) *Goodier* v. *Edmunds*, (1893) 3 Ch. 455; 62 L. J. Ch. 649; *Tullett* v. *Colville*, (1894) 3 Ch. 381; 63 L. J. Ch. 544; affirming (1894) 2 Ch. 310.

(*s*) *Banks* v. *Scott*, 5 Mad. 493.

himself (*t*), and when it does so the conversion produces all its natural consequences (*u*).

The law with regard to infants seems now to be on the same footing. Previous to the Wills Act (*x*), when an infant might bequeath his personalty at an earlier age than he could devise his realty, there was great indisposition in the Court to interfere with this right by converting his property, and it was only done in cases of urgent necessity (*y*). But this reason now no longer exists, and there is, therefore, nothing to distinguish the case from that of a lunatic (*z*). or infant.

In the absence of special clauses for that purpose, the effect of a Railway Act is not to alter the devolution of property without the consent of the owner; and, therefore, if a company contract with an incapacitated person, as a lunatic, the purchase-money of land will not be deemed to have been converted (*a*). Purchase under a Railway Act.

When land is taken by virtue of compulsory powers under the Lands Clauses Consolidation Act, 1845 (*b*), from a person of unsound mind not so found by inquisition, the better opinion is, that there is no conversion, and on the owner's death intestate his heir will be entitled (*c*). The same rule applies where the land of an infant is taken by a railway company under s. 69 of this Act; the purchase-money retains its character of real estate, and descends to the infant's heir-at-law (*d*). Purchase under compulsory powers; 8 & 9 Vict. c. 18. Lunatic. Infant.

In the case of a sale of an infant's or a lunatic's property under a decree in a partition action, there is no conversion, Sale under Partition Acts.

(*t*) *Oxenden* v. *Compton*, 2 Ves. jr. 72; *Exp. Phillips*, 19 Ves. 124.

(*u*) *Exp. Grimstone*, Amb. 706; 4 Bro. C. C. 235; *In re Mary Smith*, 10 Ch. 79; *Baldwin* v. *Smith*, (1900) 1 Ch. 588; 69 L. J. Ch. 336.

(*x*) 1 Vict. c. 26.

(*y*) *Exp. Grimstone*, *sup.*

(*z*) *Dyer* v. *D.*, 34 Beav. 504; and see *Exp. Bromfield*, 1 Ves. jr. 461; 3 Bro. C. C. 515.

(*a*) *Mid. C. R. Co.* v. *Oswin*, 1 Coll. 74, 80; *Re Sloper*, 22 Beav. 198, cited.

(*b*) 8 & 9 Vict. c. 18.

(*c*) *Re Tugwell*, 27 Ch. D. 309; 53 L. J. Ch. 1006, dissenting from *Exp. Flamank*, 1 Sim. N. S. 260.

(*d*) *Kelland* v. *Fulford*, 6 Ch. D. 491.

and the proceeds of sale retain their character of realty, by virtue of s. 8 of the Partition Act, 1868 (*e*).

Married woman.

Where, however, there was a sale by the consent of a married woman under s. 6 of the Act, the property was held to be converted (*f*). And the same is the case when a sale has been ordered, whether under the Lands Clauses Act or in a partition action, and the proceeds paid to trustees who have a power of sale (*g*).

II. *The effects of Conversion.*

These may be most conveniently discussed by distinguishing the case of the conversion of money into land from that of land into money.

1. *Of money into land.*

Money converted into land acquires properties of land.

Generally speaking, money directed to be laid out in land, whether by contract or will, acquires all the properties of land. Thus it will descend as land to the legal heir (*h*). In what character it will be taken by an heir will be presently considered (*i*). It will pass by a general devise (*k*), and not by a general bequest (*l*). It will be subject to tenancy by the curtesy (*m*); but was not subject to dower, while it did not attach on equitable estates (*n*). Now, by virtue of 3 & 4 Will. IV. c. 105, it presumably would be so.

(*e*) 31 & 32 Vict. c. 40. *Foster* v. *F.*, 1 Ch. D. 588; *Re Barker*, 17 Ch. D. 241; 50 L. J. Ch. 334; *Mordaunt* v. *Benwell*, 19 Ch. D. 302; 54 L. J. Ch. 247; *Norton* v. *N.*, (1900) 1 Ch. 101; 69 L. J. Ch. 31.

(*f*) *Wallace* v. *Greenwood*, 16 Ch. D. 362.

(*g*) *Re Hobson's Trusts*, 7 Ch. D. 708; *Smith* v. *May*, (1900) 2 Ch. 474; 69 L. J. Ch. 735.

(*h*) *Scudamore* v. *S.*, Prec. Ch. 543.

(*i*) P. 494.

(*k*) *Greenhill* v. *G.*, 2 Vern. 679.

(*l*) *Edwards* v. *C. of Warwick*, 2 P. Wms. 171.

(*m*) *Sweetapple* v. *Bindon*, 2 Vern. 536.

(*n*) *Cunningham* v. *Moody*, 1 Ves. sr. 174, 176.

But in some respects money directed to be laid out in land is not impressed with the quality of land. It is not deemed land for fiscal purposes, but is liable to legacy, not to succession, duty (*o*), and now, of course, to estate duty. Where, by order of the Court in lunacy, money of a lunatic was laid out in land, on the death of the lunatic the land was held to be part of the lunatic's personal estate, liable to probate duty (*p*). Exceptions.

2. *Of land into money.*

Following the analogy of the converse case, land notionally converted into money will pass to the personal representatives of a deceased person (*q*), or will be included under a general residuary bequest (*r*), and will not be affected by a devise of land (*s*). An alien, even previous to 33 Vict. c. 14, was entitled to the proceeds of sale of land devised to be sold for his benefit (*t*). The proceeds of sale of a real estate directed to be sold are liable to legacy duty (*u*); and, it seems, to probate duty (*x*). Land into money.

There are exceptions also in this case: thus money to arise from sales of land was within the provisions of the Mortmain Act (*y*). It, however, did not escheat to the Crown upon a failure of heirs, nor had the Crown any right to come into equity to ask that the land should be converted in order that it might take as *bona vacantia*. Even if it had been actually converted, but unnecessarily so, the Crown could not make good its claim (*z*). But by How far retaining quality of land.

(*o*) *Re De Lancy*, L. R. 6 Ex. 102; and see *Macfarlane* v. *Lord Advocate*, (1894) A. C. 291.

(*p*) *Att.-Gen.* v. *M. of Ailesbury*, 12 App. Cas. 672; 16 Q. B. D. 408; 14 *ib.* 895; 57 L. J. Q. B. 83.

(*q*) *Ashby* v. *Palmer*, 1 Mer. 296.

(*r*) *Stead* v. *Newdigate*, 2 Mer. 521.

(*s*) *Elliott* v. *Fisher*, 12 Sim. 505.

(*t*) *Du Hourmelin* v. *Sheldon*, 1 Beav. 79; 4 My. & Cr. 525.

(*u*) 55 Geo. III. c. 184; *Att.-Gen.* v. *Holford*, 1 Pri. 426; *Att.-Gen.* v. *Dodd*, (1894) 2 Q. B. 150; 63 L. J. Q. B. 319.

(*x*) *Re Goods of Gunn*, 9 P. D. 242; 53 L. J. P. D. & A. 107; *Att.-Gen.* v. *Lomas*, L. R. 9 Ex. 29; but see *Matson* v. *Swift*, 8 Beav. 368.

(*y*) 9 Geo. II. c. 36; *Att.-Gen.* v. *Weymouth*, Amb. 20; *Brook* v. *Badley*, 4 Eq. 106; 3 Ch. 672; but now see 54 & 55 Vict. c. 73.

(*z*) *Taylor* v. *Haygarth*, 14 Sim. 8; *Cradock* v. *Owen*, 2 Sm. & G. 241.

the Intestates' Estates Act, 1884 (*a*), the rights of the Crown have been extended to include such cases.

3. *Character of converted property.*

Nature of converted property.

We have seen that money directed to be laid out in land acquires the descendible property of land, so as to pass in case of intestacy to the heir. The question then often arises as to the character in which the heir receives it—that is, whether it becomes his real or his personal property. This is evidently an all-important inquiry as between his representatives, when the heir thus receiving the converted money dies without having made any disposition thereof. The nature of the property in the hands of the heir has been held to depend upon the manner in which the conversion has taken place.

Depends on manner of conversion.

Bequest.

First, if the converted money was bequeathed to be invested in land for the use of A. and his heirs, or on his marriage money has been paid by him, or paid or covenanted to be paid by a stranger to trustees, to be laid out in land and settled in strict settlement, with remainder to the heirs of A., then A. will hold the converted money as land, and on his decease, his heir will be preferred to his personal representative (*b*).

Covenant.

Secondly, if A. has covenanted to lay out a sum of money in land to be settled on himself for life, remainder to his wife for life, remainder to the issue of the marriage, and he dies leaving his wife or any issue of the marriage surviving him, then also the conversion continues to operate; and on the death of the wife and issue, the heir of A. will be entitled to it (*c*).

But if, in such a case as the last, A. does not leave any wife or issue him surviving, then on his decease his personal representative will be entitled; the distinction

(*a*) 47 & 48 Vict. c. 71; and see *Panes* v. *Att.-Gen.*, (1901) 1 Ch. 15; 70 L. J. Ch. 12.

(*b*) *Scudamore* v. *S.*, Prec. Ch. 543; *Disher* v. *D.*, 1 P. Wms. 204.

(*c*) *Kettleby* v. *Atwood*, 1 Vern. 298, 471.

being, that in this case the obligation to lay out the money and the right to call for it have become centered in the same person, so that the covenant may be considered discharged. There is then no equity left in his heir to call for the money from his personal representative (*d*).

Principle of the distinctions.

The principle may perhaps be thus expressed: if at the death of the person first entitled to the converted fund there still exists an enforceable obligation to convert it, the effect of the conversion continues, and the heir takes; but if previous to his death this obligation ceases, the right to demand and the duty to effect the conversion centering in the same person, then the effect of the conversion ceases, and on his death his personal representative takes (*e*).

III. *Time from which Conversion takes place.*

General rule as to time of conversion, when directed.

Many important questions depend upon the question as to the precise time from which the doctrine of conversion begins to operate upon the property concerned. The general principle is that where an absolute conversion is directed to be made, it takes effect at the time at which the instrument directing it comes into operation. Thus in the case of a will the conversion takes place at the death of the testator (*f*). In the case of a deed it takes place at the date of the execution and delivery (*g*); and this notwithstanding that the actual transmutation is directed not to take place until a future time (*h*).

In bankruptcy.

When conversion takes place not under the intention of the owner, the time of its operation depends upon circum-

(*d*) *Chichester* v. *Bickerstaffe*, 2 Vern. 295; *Pulteney* v. *Darlington*, 1 Bro. C. C. 223.

(*e*) *Wheldale* v. *Partridge*, 8 Ves. 235.

(*f*) *Beauclerk* v. *Mead*, 2 Atk. 167; *Morris* v. *Griffiths*, 26 Ch. D. 601; 53 L. J. Ch. 1051.

(*g*) *Griffith* v. *Ricketts*, 7 Ha. 299.

(*h*) *Hewitt* v. *Wright*, 1 Bro. C. C. 86; *Clarke* v. *Franklin*, 4 K. & J. 257.

stances. Thus in the case of the sale of a bankrupt's real estate, if such sale takes place after the death of the bankrupt, no actual conversion having taken place in his lifetime, whatever remains after satisfying the creditors will belong to his heir-at-law (*i*), though, as we have seen, if the sale took place in his lifetime the surplus would pass to his next of kin. Thus conversion only takes place at the time of the contract for sale.

In compulsory purchases.

A mere notice to treat by a company having compulsory powers of purchasing land will not operate as a conversion thereof into personalty (*k*). As soon, however, as the quantity and price are fixed between the landowner and the company, conversion takes place (*l*). The same is the case when the price is fixed by arbitration (*m*), by valuation (*n*), or by verdict of a jury (*o*). The actual time of conversion is the completion of a binding agreement if voluntary, or the ascertaining of the definite terms of the transaction if compulsory (*p*).

Where conversion depends on the option of a third person.

In a case in which the conversion is not absolutely directed, but is made to depend upon the option of another person, the same general rule applies. Thus where a farm was leased to A. for seven years, and on the lease was endorsed an agreement that A. should have an option within a given time of purchasing the inheritance for £3,000, it was held that the conversion took place as from the execution of the lease; and the lessor having died before the option of purchase was exercised, the money was treated as part of his personal estate (*q*). Nevertheless, until the option in such a case is exercised, the rents and profits go to the person entitled to the real estate (*r*).

(*i*) *Banks* v. *Scott*, 3 Madd. 493.
(*k*) *Haynes* v. *H.*, 1 Dr. & Sm. 426; *Exp. Arnold*, 32 Beav. 591; *Richmond* v. *N. L. R. Co.*, 5 Eq. 352.
(*l*) *Exp. Hawkins*, 13 Sim. 569.
(*m*) *Harding* v. *Met. Ry. Co.*, 7 Ch. 154.
(*n*) *Watts* v. *W.*, 17 Eq. 217.
(*o*) *Haynes* v. *H.*, *sup.*
(*p*) See also *Re Dykes' Estate*, 7 Eq. 337; *Re Manchester & S. R. Co.*, 19 Beav. 365.
(*q*) *Lawes* v. *Bennett*, 1 Cox, 167; *Isaacs* v. *Reginall*, (1894) 3 Ch. 506; 63 L. J. Ch. 815.
(*r*) *Townley* v. *Bedwell*, 14 Ves. 591; *Exp. Hardy*, 30 Beav. 206.

The result, therefore, is that the ultimate destination of the property depends entirely upon the choice of the person who has the option of purchase. If he elects not to purchase, it remains real estate; if he elects to purchase, it is deemed converted into personal estate, and the conversion relates back to the time when the option was given.

Intention prevails if ascertainable.

Such is the case where there is nothing to indicate a contrary intention on the part of the original owner; but like all secondary rules respecting the construction of instruments, it is subject to the primary rule that the intention of the owner, where it can be ascertained, is to prevail. If, therefore, in the instrument by which the option is given, there is an express direction that the purchase-money shall be paid to the person who is then the owner of the estate, he alone will be entitled to it (*s*). And if, *after* having given an option of purchasing certain real estate, a testator *specifically* devises the same estate, this amounts to a sufficiently clear indication of intention respecting it to entitle the devisee to the purchase-money when the option has been exercised (*t*); and similarly, also, where the option and the specific devise are practically simultaneous (*u*). No such intention would be inferred from a mere *general* devise, after the agreement (*x*); nor if the agreement for the optional purchase is made *subsequently* to the will containing a specific devise of the property (*y*).

(*s*) *Re Graves Minor*, 15 Ir. Ch. Rep. 357.

(*t*) *Drant* v. *Vause*, 1 Y. & C. Ch. 580; *Emuss* v. *Smith*, 2 De G. & S. 722.

(*u*) *Pyle* v. *P.*, (1895) 1 Ch. 724; 64 L. J. Ch. 477.

(*x*) *Collingwood* v. *Row*, 5 W. R. 484.

(*y*) *Weeding* v. *W.*, 1 J. & H. 424; *Goold* v. *Teague*, 7 W. R. 84.

IV. *Effects of failure of the purposes for which Conversion is directed.*

1. *Where conversion is voluntary.*

Total failure no conversion.

The general rule is, that when a conversion is directed by will, and the purpose for which the conversion was intended totally fails before the will comes into operation, that is, in the testator's lifetime, no conversion will take place, and the property so directed to be converted will result to the testator in its original form unchanged (*z*). "Every conversion, however absolute in its terms, will be "deemed to be a conversion for the purposes of the will "only, unless the testator distinctly indicates an intention "that it is, on the failure of those purposes, to prevail as "between the persons on whom the law casts the real and "personal property of an intestate, namely, the heir and "next of kin" (*a*).

Partial failure; conversion takes place only so far as necessary.

If the failure is but partial, conversion will take place only to such extent as is necessary to effect the purpose of the will. And, in as far as it is not required for that purpose, the property will result unchanged. Thus in *Ackroyd* v. *Smithson* (*b*) a testator gave several legacies, and ordered his real and personal estate to be sold, and his debts and legacies to be paid out of the proceeds of the sale: he gave the residue thereof to certain legatees in the proportion of their legacies. Two of these residuary legatees died in the lifetime of the testator. It was held that these lapsed shares, so far as they were constituted of personal estate, should go to the testator's next of kin, and so far as they were constituted of real estate to his heir, notwithstanding the directed sale. Even where there was a direction that the proceeds of real estate should be deemed personalty, and it was expressly declared that it should not lapse for the benefit of the heir-at-law, the heir-at-law was held not

(*z*) *Hill* v. *Cock*, 1 V. & B. 175; *Fitch* v. *Weber*, 6 Ha. 145.

(*a*) 1 Jarm. Wills, 623, 4th ed.

(*b*) 1 Bro. C. C. 503; 1 W. & T. L. C. 949.

to be excluded. It was considered that the declaration was only intended to apply as far as conversion was required for the purposes of the will, and that it did not prevent the law from dealing with a surplus in accordance with its usual rules (*c*). The heir will only be excluded by a gift over, in case of a lapse (*c*).

The same result follows where money arising from land directed to be sold is given over on an event which never happens (*d*), and where the whole or a part of the purpose for which it is given fails for illegality, as, for instance, being void under the Mortmain Act (*e*), or being so limited as to transgress the rule as to perpetuities (*f*).

Rule applies whether land be converted into money or *vice versâ*.

The rule that conversion takes place only so far as the purposes of the will require, applies equally whether it be land converted into money, or money into land (*g*). And it will have been seen from the cases of *Ackroyd* v. *Smithson* and *Jessop* v. *Watson*, above referred to, that it is immaterial that there is a blending of the proceeds of sale of realty with the personalty.

Blending of proceeds of sale and personalty immaterial.

Effect of gift over.

So far we have considered only those cases in which, there being a failure of the purposes for which conversion is directed, the conflict as to who shall take the lapsed property is only between the heir and next of kin. The testator, however, may provide for a lapse by making a gift over of the property which may be thus released. If such a gift over is specific and clear, no difficulty arises; but conflict is often occasioned where the only gift over is in the form of a residuary devise or bequest; it being frequently open to question whether such residuary gift was intended to comprise the undisposed-of shares.

Specific gift.

Residuary legacy. *Maugham* v. *Mason*.

One class of cases is that in which the dispute is between the heir and a residuary legatee. In *Maugham* v. *Mason* (*h*)

(*c*) *Fitch* v. *Weber*, *sup.*; *Collins* v. *Wakeman*, 2 Ves. jr. 683.

(*d*) *Jessop* v. *Watson*, 1 My. & K. 665.

(*e*) *Att.-Gen.* v. *Lord Weymouth*, Amb. 20.

(*f*) *Burley* v. *Evelyn*, 16 Sim. 290.

(*g*) *Cogan* v. *Stephens*, 1 Beav. 482, n; *Simmons* v. *Pitt*, 8 Ch. 978.

(*h*) V. & B. 410.

a testator devised freeholds to trustees and their heirs upon trust to sell and to apply the proceeds of sale towards the payment of debts and legacies, the rents until sold to be applied to the same uses, and, after giving some pecuniary and specific legacies, as to the rest residue and remainder of his personal estate after payment of his debts, legacies, and funeral expenses, he bequeathed the same to his trustees, their executors, administrators, and assigns, upon trust, to convert all the said residue into ready-money, and to lay out the same in the purchase of freehold property to be settled as therein mentioned. The executors in fact paid all the debts, legacies, and funeral expenses out of the personal estate, and did not sell the freeholds. It was held that the freeholds resulted to the heir-at-law, and were not comprised in the residuary bequest. The principle was that the conversion was only directed for a particular purpose, and as that purpose never required it, there was no conversion, and consequently none of the results of conversion followed. If, however, the testator had declared expressly that the proceeds of the real estate should be considered a part of the personalty, the case would have been otherwise; that would have shown that the conversion was not merely intended to be for a particular purpose, but to be absolute, carrying with it all its consequences; and the proceeds of sale would accordingly be included in the residuary bequest (*i*). Apart even from such an express declaration, there may be in the circumstances of the case such an indication of intention as will lead to the same result; the blending of the proceeds of sale with the personalty supplies an argument in favour of such an intention (*k*). The intention to exclude the heir must, however, be clear. *The true test is, whether the conversion is directed only for particular purposes or is intended to be absolute* (*l*).

Intention to exclude the heir must be clear.

(*i*) *Kidney* v. *Coussmaker*, 1 Ves. jr. 436; *Bright* v. *Larcher*, 3 De G. & J. 156.

(*k*) *Byam* v. *Munton*, 1 R. & M. 503; *Court* v. *Buckland*, 1 Ch. D. 605.

(*l*) *Amphlett* v. *Parke*, 2 R. & M. 221.

Residuary devise.

The cases are now rare in which there is a conflict between the heir and the residuary devisee, since, by the Wills Act (*m*), s. 25, it is enacted that unless a contrary intention appears in the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will. As to the law in cases not within this Act, reference may be made to *Collins* v. *Wakeman* (*n*); *Jones* v. *Mitchell* (*o*).

Failure of purposes of conversion in settlement *inter vivos* resulting to settlor.

In the case of a failure of the purposes of conversion under an instrument *inter vivos*, the property results to the settlor or grantor. In what character he takes it, as between his real and personal representatives, we shall presently inquire.

2. *Conversion by order of the Court.*

Sale under order of the Court.

It has been decided that the doctrine of *Ackroyd* v. *Smithson* does not apply to the case of a sale under an order of the Court. Where lands were sold in order to raise the costs of an infant's partition suit, it was held that the personal representative was entitled to the surplus (*p*).

Complete conversion notwithstanding partial failure,

The sale being properly made there was an immediate conversion, and there was no equity to effect a reconversion. The case, therefore, rather resembles in principle an instance of conversion under a deed, than the case of a partial failure of the purposes of conversion under a will. The conversion in such cases takes effect from the date of the order for sale (*q*).

unless

The rule, however, is of course subject to any statutory

(*m*) 1 Vict. c. 26.
(*n*) 2 Ves. jr. 683.
(*o*) 1 S. & S. 290.
(*p*) *Steed* v. *Preece*, 18 Eq. 192.
(*q*) *Hyett* v. *Meakin*, 25 Ch. D. 735; 53 L. J. Ch. 241; *Hartley* v. *Pendarves*, (1901) 2 Ch. 498; 70 L. J. Ch. 745.

statutes direct the contrary.

Partition Act.

provisions which apply in particular cases. Thus, where real estate to which infants were entitled were sold under a decree in a partition suit, the proceeds of sale were, by s. 8 of the Partition Act, 1868 (*r*), treated as realty (*s*). In the case of a sale under the same circumstances of the separate estate of a married woman, the question of conversion depends upon her consent. If she consent, there is a conversion; if not, there is no conversion (*t*).

V. *In what Character Unconverted Property results.*

The next inquiry is, whether an heir who takes land directed to be sold, on failure of the purposes of conversion, takes it as real or as personal property; and a similar inquiry follows respecting the next of kin taking under analogous circumstances. The questions often arise between the real and personal representatives of the persons thus benefiting by the resulting trust.

1. First as to an heir taking land directed to be sold on a lapse.

Heir takes lapsed land where conversion directed by will; if sale is necessary, as personalty.

Where conversion is directed by will, and there is a failure of the purposes for which it is directed, the quality in which it results to the heir depends upon the question, whether an actual sale is required for the purposes of the will. If such a sale is necessary, then, whether it has actually taken place or not before the death of the heir, the property results in a converted form as personalty; and will, on the death of the heir intestate, pass to his next of kin (*u*).

(*r*) 31 & 32 Vict. c. 40.

(*s*) *Foster* v. *F.*, 1 Ch. D. 588.

(*t*) *Wallace* v. *Greenwood*, 16 Ch. D. 62; 50 L. J. Ch. 289; *Mildmay* v. *Quicke*, 6 Ch. D. 553; *Kelland* v. *Fulford*, 6 Ch. D. 491; and see *Smith* v. *May*, (1900) 2 Ch. 474; 69 L. J. Ch. 735; *Norton* v. *N.*, (1900) 1 Ch. 101; 69 L. J. Ch. 31, *supra*, p. 492.

(*u*) *Smith* v. *Claxton*, 4 Madd. 492; *Wright* v. *W.*, 16 Ves. 188;

On the contrary, if there is no necessity for any sale in order to carry out the trusts of the will—if, for instance, there is a total failure of the purposes of conversion—then the property results to the heir as realty, and will on his death intestate descend to his heir (*x*). And if a sale has unnecessarily been effected, this will not vary the rights of the parties (*y*). But the question as to the necessity of the sale is determined by the state of facts at the testator's death (*z*).

If sale not necessary, as land.

In the case of a conversion arising under an instrument *inter vivos*, the question takes a somewhat different form. In this case, if there be an entire failure of the purposes of conversion *ab initio*, no conversion is deemed to have taken place at all, and the property results to the settlor or grantor in its original form (*a*). If there is only a partial failure, then the conversion operates, in accordance with the usual rule, from the execution and delivery of the deed, and having once taken place, whatever results, results in its converted form (*b*). It will be observed that the underlying principle is just the same as in the case of a will. In each case *the quality of the resulting property depends upon the question of the necessity for actual conversion.*

Under instruments *inter vivos*, if purpose fails *ab initio*, no conversion takes place.

If failure is only partial it results in its converted form.

2. When money is directed to be laid out in land, and the purposes for which conversion was directed partially fail, the money in so far as not required results as to the personal representative (*c*); and in all cases, whatever results, results as real estate (*d*).

Money directed to be laid out in land.

Whatever results on failure results as realty.

Scales v. *Heyhoe*, (1892) 1 Ch. 379; 61 L. J. Ch. 202.

(*x*) *Chitty* v. *Parker*, 2 Ves. jr. 271; *Buchanan* v. *Harrison*, 1 J. & H. 673.

(*y*) *Davenport* v. *Coltman*, 12 Sim. 610.

(*z*) *Carr* v. *Collins*, 7 Jur. 165; 1 Jarm. Wills, 631, ed. 4.

(*a*) *Hewitt* v. *Wright*, 1 Bro. C. C. 86; *Clarke* v. *Franklin*, 4 K. & J. 257.

(*b*) *Griffith* v. *Ricketts*, 7 Ha. 299; *Wheldale* v. *Partridge*, 8 Ves. 236.

(*c*) *Cogan* v. *Stevens*, 1 Beav. 482, n.

(*d*) *Curteis* v. *Wormald*, 10 Ch. D. 172, overruling *Reynolds* v. *Godlee*, 1 Johns. 536.

Reconversion.

Election to take in unconverted form.

Although land directed or agreed to be converted into money, or money directed or agreed to be converted into land, is, as we have seen, at once impressed in equity with a new character, still it is open to a person receiving the converted property, if not under disability, to elect to take it in its original state. It has been said that "equity, like nature, will do nothing in vain" (*e*); and it would evidently be vain and useless to insist that a person should take a fund in the quality of land, when he prefers it in the form of money, and can at any moment reduce it to that form by a sale. It is necessary to consider certain rules which regulate this power of electing against an instrument which directs conversion.

Presumption against reconversion.

The right of electing to reconvert is simple enough when the person claiming to do so has an absolute interest in the property in question. It is to be observed, however, that the presumption is against reconversion. In case of any dispute as to the fact, the *onus* of proof is on those who allege that the owner has elected to take in the original form rather than in that directed by the instrument which effected the conversion (*f*). Further:

Person electing must be *sui juris*. Lunatic.

1. *The person affecting to elect must be* sui juris.

Thus a lunatic cannot elect (*g*); neither can an infant (*h*); but in some cases, where it has been manifestly for his advantage, the Court has elected for him (*i*); and in either case the Court may direct an inquiry as to whether it is for the benefit of the infant or lunatic to reconvert. In a case in which money of a lunatic was laid out in the purchase of land by order of the Court, it was directed that

(*e*) *Seeley* v. *Jago*, 1 P. Wms. 389.
(*f*) *Sisson* v. *Giles*, 3 De G. J. & S. 614; 11 W. R. 971; *Benson* v. *B.*, 1 P. Wms. 130.
(*g*) *Ashby* v. *Palmer*, 1 Mer. 296.
(*h*) *Carr* v. *Ellison*, 2 Bro. C. C. 56.
(*i*) *Robinson* v. *R.*, 19 Beav. 494.

the lands should be conveyed to the committees, their heirs and assigns, upon trust for the lunatic, his executors, administrators, and assigns, so as to preserve its character of personalty as between the heir and next of kin (*k*).

Married woman.

A married woman with respect to her separate estate is regarded as *sui juris*, and is competent to elect (*l*). With regard to property not so limited, the law prior to the Married Women's Property Act, 1882 (*m*), depended upon the Fines and Recoveries Act (*n*). Previous thereto she could not, where money was directed to be laid out in land, alter its nature by contract or deed (*o*). She might, however, elect to take it as money by consent after examination in Court (*o*), and the same result was sometimes reached by the device of making a sham purchase. By s. 77 of the last-named Act, she was enabled by deed acknowledged to effectually elect to take as money (*p*). Under the same section, she might, in the same manner, elect to take in its original form real estate directed to be converted into money (*q*), even though it be reversionary (*r*). Under the present Act, the disability of married women is removed, and there is no reason for attributing any incapacity in the matter of conversion (*s*).

Person can only bind his own interest by election.

2. No one can so elect as to bind any interests save his own and those of persons claiming through him. Thus, a remainderman cannot elect to take as money a fund directed to be laid out in land, against the wish of the tenant for life, who has a right to insist on having it laid out as directed (*t*). And in the same case it was laid down that even if a remainderman purported so to elect, he could

(*k*) *Att.-Gen.* v. *M. of Ailesbury*, 12 App. Cas. 472; 57 L. J. Q. B. 83.

(*l*) *Sharp* v. *St. Sauveur*, 7 Ch. 343.

(*m*) 45 & 46 Vict. c. 75.

(*n*) 3 & 4 Will. IV. c. 74.

(*o*) *Oldham* v. *Hughes*, 2 Atk. 453.

(*p*) *Forbes* v. *Adams*, 9 Sim. 462.

(*q*) *Briggs* v. *Chamberlain*, 11 Ha. 69; *Franks* v. *Bollans*, 2 Ch. 717.

(*r*) *Tuer* v. *Turner*, 20 Beav. 560; *Miller* v. *Collins*, (1896) 1 Ch. 573; 65 L. J. Ch. 353.

(*s*) See *Weldon* v. *Neal*, W. N. 1884, p. 153.

(*t*) *Sisson* v. *Giles*, *sup.* See and distinguish *Walrond* v. *Rosslyn*, 11 Ch. D. 640.

not do so, so as to affect the rights of his real and personal representatives in case of intestacy; and that, therefore, his heir would, notwithstanding his attempt, be entitled to the money. He may, of course, by deed or will dispose of his own interest in such a manner as he pleases (*u*).

Tenant-in-tail.

A tenant-in-tail of money directed to be invested in land might as against his issue elect to take as money (*x*), but he could not prejudice the rights of remaindermen (*y*). Now, by the Fines and Recoveries Act (*z*), s. 71, money directed to be laid out in lands to be settled in tail is for the purposes of that Act to be treated as the lands to be purchased would be treated, and to be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to.

Person interested in undivided shares.

Election of one may not prejudice others.

The same principle applies when the property in question is bestowed on a number of persons in undivided shares. If election to take it in its original form can be made without prejudice to the others it is allowable; if not, it is not so. The application of this leads to the following distinction. If money is directed to be laid out in land and devised to a number of tenants in common, then any one or more may elect to take his or their shares as money; since this will in no way interfere with the others having the money laid out in land if they so choose (*a*). But if land is directed to be sold and the money divided equally, then it is not open to one of the co-legatees to elect to take his share as land; for to allow this would prejudice the sale, and so interfere with the rights of the others (*b*).

Persons entitled contingently.

A person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, and such election will become operative upon the contingency happening before or upon his death (*c*).

(*u*) *Lingen* v. *Sowray*, 1 P. Wms. 172.
(*x*) *Benson* v. *B.*, 1 P. Wms. 130.
(*y*) *Trafford* v. *Boehm*, 3 Atk. 440.
(*z*) 3 & 4 Will. IV. c. 74.
(*a*) *Secley* v. *Jago*, 1 P. Wms. 389; *Walker* v. *Denne*, 2 Ves. jr. 182.
(*b*) *Deeth* v. *Hale*, 2 Mall. 317; *Holloway* v. *Radcliffe*, 23 Beav. 163.
(*c*) *Meek* v. *Devenish*, 6 Ch. D. 566.

3. *How an election to reconvert may be effected.*

(1.) When there exists an election to reconvert, this may of course be effected by an express declaration of intention. A parol declaration has been often held sufficient (*d*), but was refused in *Bradish* v. *Gee* (*e*). Intention expressed.

(2.) Election may be implied from language which does not amount to an express declaration; for instance, where a fund had been agreed to be laid out in land, a description thereof in a will as money amounted to an election to take it as personalty (*f*). Similarly a devise of land as such amounted to an election to take as land, notwithstanding that a sale had been directed (*g*). Intention implied from language;

(3.) Election may be implied from the acts of the party entitled; and slight circumstances have been deemed sufficient (*h*). Thus keeping land unsold for a long time raises a presumption of an election to take as land (*i*). Two years' retention was, however, considered insufficient (*k*). The granting of a lease and reserving a rent was held sufficient evidence of an intention to reconvert (*l*); and the same was the case where the *cestui que trust* of lands settled on trust for sale obtained possession of the title deeds, and retained them together with possession of the land until his death (*m*). Acts, however, which show an intention to reconvert lands directed to be sold, in which a person has an immediate interest, were held not applicable to lands devised by the same will, the direction to convert which was only to come into operation after a life interest still in existence. The intention to reconvert those in possession did not imply a similar intention as to others in remainder (*n*). from acts. Illustrations.

(*d*) *Edwards* v. *Warwick*, 2 P. Wms. 174; *Pulteney* v. *Darlington*, 1 Bro. C. C. 237; *Wheldale* v. *Partridge*, 8 Ves. 236.
(*e*) Amb. 229.
(*f*) *Pulteney* v. *Darlington*, *sup.*
(*g*) *Sharp* v. *St. Sauveur*, 7 Ch. 343.
(*h*) *Foxwell* v. *Lewis*, 30 Ch. D. 654; 55 L. J. Ch. 232.
(*i*) *Dixon* v. *Gayfere*, 17 Beav. 433; *Mutlow* v. *Bigg*, 1 Ch. D. 385; *Re Gordon*, 6 Ch. D. 531.
(*k*) *Kirkman* v. *Miles*, 13 Ves. 338.
(*l*) *Crabtree* v. *Bramble*, 3 Atk. 680.
(*m*) *Davies* v. *Ashford*, 15 Sim. 44.
(*n*) *Meredith* v. *Vick*, 23 Beav. 559.

When money directed to be laid out in land is received by the beneficiary from the trustees, it is deemed to be reconverted (*o*); but the receipt of the income for a long time was not considered sufficient (*p*). Where securities for moneys were assigned to trustees, to be invested in land to be settled upon a man and his wife with an ultimate limitation to the man's right heirs, and the husband died after some of the money had been laid out on other personal securities in trust for him, his executors, and administrators, there was held to be an election to take the money as personalty (*q*).

The mere neglect of trustees to perform their duty of effecting a conversion which is directed, will not affect the rights of others through the medium of the principle of reconversion. It falls rather within the doctrine of primary conversion, which rests, as we have seen, on the maxim that equity regards that done which ought to have been done (*r*).

(*o*) *Pulteney* v. *Darlington*, 1 Bro. C. C. 237; *Rook* v. *Worth*, 1 Ves. sr. 461.

(*p*) *Gillies* v. *Longlands*, 4 De G. & Sm. 372; *Re Pedder's Settlement*, 5 De G. M. & G. 890.

(*q*) *Lingen* v. *Sowray*, 1 P. Wms. 172; *Cookson* v. *C.*, 12 Cl. & F. 121.

(*r*) *Lechmere* v. *E. of Carlisle*, 3 P. Wms. 215.

Section III.—Satisfaction and Performance.

Satisfaction.

Definition.

I. *Where the claim alleged to be satisfied arises from bounty.*
   1. *Satisfaction of legacies by portions* (*Ademption*).
   2. *Satisfaction of portions by legacies.*
   3. *Repetition of legacies.*

II. *Satisfaction of debts.*
   1. *By legacies.*
   2. *By portions.*

Performance.

Contrasted with Satisfaction.

1. *By act of the party.*
2. *By operation of law* (*Intestacy*).

Definition.

In the construction of instruments equity often recognises a principle known as the doctrine of Satisfaction. It arises in cases in which a donor, being already under some obligation to the donee, effects a donation under circumstances which indicate an intention that this shall be taken in satisfaction of the prior obligation.

Intention expressed.

When this intention is expressed, no comment is required; for where the subsequent gift is expressly bestowed in extinguishment of the prior demand, the donee clearly cannot claim both (*a*).

(*a*) *Hardingham* v. *Thomas*, 2 Drew. 353.

Intention implied.

But in many cases this intention has to be implied from circumstances, and then considerable difficulty is often experienced. In dealing with them it will be convenient to distinguish between those cases in which the prior obligation arises from an act of bounty and those in which it is of the nature of a debt.

Division of subject.

In the former class fall the cases of the satisfaction of legacies by portions (commonly called ademption), and conversely the satisfaction of portions by legacies. From the similarity of the principles involved, we shall here also consider the case of the repetition of legacies in the same instrument, sometimes referred to as the satisfaction of legacies by legacies.

The latter head comprises the satisfaction of debts by legacies and by portions. After discussing this, we shall contrast it with the somewhat similar but distinctive doctrine of performance.

I. *Where the claim alleged to be satisfied arises from bounty.*

1. *The satisfaction of legacies by portions (Ademption).*

This subject was elaborately discussed and expounded in the leading case *ex parte Pye, ex parte Dubost* (*b*), where it was laid down as a general rule, that where a parent gives a legacy to a child, not stating the purpose for which he gives it, he is understood to give a portion; and, since equity regards double portions with disfavour, if the parent afterwards advances a portion on the marriage of the child, the presumption arises that it was intended to be a satisfaction of the legacy, either wholly or in part.

Foundation of

(1.) From this case it is seen that the principle of

(*b*) 18 Ves. 140 ; 2 W. & T. L. C. 338.

ademption generally rests on the leaning of equity against double portions. The rule of presumption against double portions applies only as between a child and a parent, or person who has placed himself *in loco parentis*. It has been thus commented on by a learned judge: "A parent "makes a certain provision for his children by will, if they "attain twenty-one or marry, or require to be settled in "life; he afterwards makes an advancement to a particular "child. Looking at the ordinary dealings of mankind, "the Court concludes that the parent does not, when he "makes that advancement, intend the will to remain in "full force, and that he has satisfied in his lifetime the "obligation which he would otherwise have discharged at "his death; and having come to that conclusion as the "result of general experience, the Court acts upon it, and "gives effect to the presumption that a double provision "was not intended. If, on the other hand, there is no "such relation either natural or artificial, the gift proceeds "from the mere bounty of the testator, and there is no "reason within the knowledge of the Court for cutting off "anything which has in terms been given. The testator "may give a certain sum by one instrument, and precisely "the same sum by another; there is no reason why the "Court should assign any limit to that bounty which is "wholly arbitrary. The Court, as between strangers, "treats several gifts as *primâ facie* cumulative" (*c*).

the principle. Leaning against double portions.

With the exception hereafter to be noticed, then, a legacy is deemed to be satisfied by a portion only when they are bestowed on a child by a parent or a person *in loco parentis* (*d*). The cases show that in this instance a mere natural relationship is not regarded, an illegitimate child being deemed at law a stranger to its father (*e*). The consequence is that an illegitimate child may happen

Relationship; parent and child generally essential.

(*c*) *Suisse* v. *Lowther*, 2 Ha. 424, 435.

(*d*) *Booker* v. *Allen*, 2 R. & M. 270; *Saunders* v. *Boyd*, (1891) 3 Ch. 394; 60 L. J. Ch. 624.

(*e*) *Exp. Pye*, 18 Ves. 152.

to find itself better provided for than it would have been if legitimate.

Locus parentis how determined.

(2.) It is often a matter of some difficulty to decide whether a person has placed himself *in loco parentis* to another or not. This depends on the intention of the person. The question is whether he meant to put himself in the situation of the lawful father of the child, as regards his office and duty to make provision for the child (*f*); and this question is of course one which must be decided according to the facts of each particular case. It is not possible to frame any precise formula by which to test the intention of the donor. It is at any rate not necessary that the person should in all respects adopt the child as his own, or that there should be any actual relationship between him and the child (*g*); and notwithstanding that the father of the child is living, if he does not maintain it (*h*), another person may be deemed to stand *in loco parentis* to it.

Exception; legacy for express purpose.

(3.) It appears that the only case in which a legacy not given by a parent or person *in loco parentis* will be adeemed by a subsequent portion, is where the legacy is *expressed* to be given for a particular purpose, and money is subsequently advanced for the same purpose (*i*), as where a testatrix bequeathed a sum to her niece adding the words "according to the wish of my late husband," and afterwards paid a similar sum to the niece, making a contemporaneous entry in her diary that such payment was a legacy from the niece's "uncle John" (*k*). But mere similarity of circumstances without expression of purpose does not suffice. Thus, where a person left a legacy of £200 to his wife to be paid within ten days after his decease, and afterwards at the request of his wife,

Implied purpose not sufficient.

(*f*) *Exp. Pye*, 18 Ves. 140; *Powys* v. *Mansfield*, 6 Sm. 528; 3 My. & Cr. 359.

(*g*) *Roger* v. *South*, 2 Kee. 598.

(*h*) *Pym* v. *Lockyer*, 5 My. & Cr. 29; *Fowkes* v. *Pascoe*, 10 Ch. 350.

(*i*) *Debeze* v. *Mann*, 2 Bro. C. C. 165, 519; *Monck* v. *M.*, 1 Ball & B. 298, 303.

(*k*) *Pollock* v. *Worrall*, 28 Ch. D. 552; 54 L. J. Ch. 89.

within a few days of his death, gave her a cheque for £200, in order that she might have a sum at her immediate disposal on his death, there was held to be no ademption, there being no expression in the will as to the purpose of the legacy (*l*). *A fortiori* there will be no ademption where the purpose of the legacy does not correspond with that of the advancement (*m*), or the legacy and advancement are given upon different contingencies (*n*).

(4.) Dismissing, then, this exceptional case, and remembering that for our present purpose a person *in loco parentis* is to be regarded as equivalent to a parent, we have now only to consider the operation of the principle of ademption as applying to gifts between a parent and child.

Portion need not be given on marriage.

Advancements are naturally made and portions given most frequently in connexion with the marriages of children; but this is by no means necessary to bring into operation the leaning against double portions and the rule of ademption (*o*).

Presumption not repelled by slight differences,

The presumption in favour of ademption is so strong that it will not be repelled by the fact that there are slight differences of circumstance between the legacy and the portion. Differences between them as to the times of payment will not suffice; thus where neither the legacy nor the portion was payable till after the testator's death, but the legacy was to vest in possession at the age of twenty-one years or marriage, while the provision by the settlement was payable within six months after the death, there was an ademption (*p*). And where a father covenanted to pay his son an annuity of £1,000 a year and to charge the same on his real estate, and by his will he left the son personal property of greater value, there was an ademption notwithstanding that the will devised the real estate "subject to the charges thereon" (*q*). In a case in which

(*l*) *Pankhurst* v. *Howell*, 6 Ch. 136.
(*m*) *Debeze* v. *Mann*, *sup.*
(*n*) *Spinks* v. *Robins*, 2 Atk. 491.
(*o*) *Leighton* v. *L.*, 18 Eq. 458; *Nevin* v. *Drysdale*, 4 Eq. 517.
(*p*) *Hartopp* v. *H.*, 17 Ves. 184.
(*q*) *Montague* v. *E. of Sandwich*, 32 Ch. D. 525; 55 L. J. Ch. 925.

the donee of a special power exercised the power by will, appointing the whole fund equally amongst children, and afterwards by irrevocable deed appointed one-third of the fund to one child, and it appeared on the evidence that this child accepted this sum in prepayment or anticipation of the share appointed by will, the rule against double portions was applied, and there was held to be a satisfaction (*r*).

or even considerable differences.

A slight difference between the limitations of the will and those of the settlement will not suffice to repel the presumption (*s*). In the case of *Durham* v. *Wharton* (*t*) ademption was held to have taken place notwithstanding very considerable differences between the gifts. There a life interest in £10,000 was given to a daughter by will, and after her decease to all her children as she should appoint. On her subsequent marriage, £15,000 was paid by the testator to her husband, he securing by settlement pin money and a jointure for his wife and portions for the younger children of the marriage. Still the legacy was held to have been adeemed (*u*). But as in most questions dependent on inferences of intention drawn from expressions and facts, the decisions are by no means easy to reconcile one with another (*x*).

Ademption *pro tanto*.

Where after a legacy of a larger amount a smaller sum is given by way of advancement or portion, the presumption is that it does not totally, but only *pro tanto*, adeem the legacy (*y*). It will presently be observed that this strongly distinguishes the principle of redemption from that of the satisfaction of a *debt* by a legacy.

By a resi-

It was formerly considered that a residuary bequest,

(*r*) *Ingram* v. *Papillon*, (1898) 1 Ch. 142; (1897) 2 Ch. 574; 67 L. J. Ch. 84.

(*s*) *Trimmer* v. *Bayne*, 7 Ves. 508.

(*t*) 3 Cl. & F. 146.

(*u*) See also *Montefiore* v. *Guedalla*, 1 De G. F. & J. 93; *Chichester* v. *Coventry*, L. R. 2 H. L. 71, 92.

(*x*) See *Tussaud* v. *T.*, 9 Ch. D. 363.

(*y*) *Pym* v. *Lockyer*, 5 My. & Cr. 29; *Kirk* v. *Eddowes*, 3 Ha. 509; *Furness* v. *Stalkartt*, (1901) 2 Ch. 346; 70 L. J. Ch. 580.

being of an uncertain amount, was not susceptible of ademption (*z*); but it has now long been established that such a bequest may be adeemed either totally or *pro tanto*, as the case may be (*a*). Reversionary bequest.

It seems that the doctrine of ademption does not rest *solely* on the ground that equity desires to secure equality between children, and for this reason discountenances double portions, as unduly favouring one; inasmuch as it is applicable even in cases where the testator leaves only one child (*b*). Where part of a *residuary* bequest to children and a stranger is adeemed by an advance to one of the children, the stranger will not be suffered to gain by the ademption, the adeemed part being divisible amongst the children only (*c*). *Secus*, however, where a pecuniary legacy is adeemed (*d*). Where there is but one child.

(5.) The following cases will indicate the limits of the application of the principle of ademption; and they serve well to show that ademption depends upon the presumed intention of the testator. Limits of the principle.

A legacy by a parent is not adeemed even *pro tanto* by occasional gifts made subsequently in the testator's lifetime; nor will the Court take an account of small sums so given, to show that they were intended as a portion (*e*). No ademption by occasional gifts,

There is no presumption of law that the payment of a sum of money to a child previous to the making of the will shall operate as an ademption of a legacy therein contained (*f*). But if a legacy has been once adeemed by a subsequent advance, it will not be re-established by a codicil made after it which purports to confirm the will and all the bequests therein (*g*). nor by a payment made before the will,

(*z*) *Freemantle* v. *Bankes*, 5 Ves. 85.

(*a*) *Scholefield* v. *Heap*, 27 Beav. 93; *Montefiore* v. *Guedalla*, *sup.*; *Vickers* v. *V.*, 37 Ch. D. 526; 57 L. J. Ch. 738.

(*b*) *Twining* v. *Powell*, 2 Coll. 262; and see 1 De G. F. & J. 103.

(*c*) *Meinertzhagen* v. *Walters*, 7 Ch. 670.

(*d*) *Kirk* v. *Eddowes*, *sup.*

(*e*) *Watson* v. *W.*, 33 Beav. 574; *Re Peacock*, 14 Eq. 236; *Ravenscroft* v. *Jones*, 32 Beav. 669; 4 De G. J. & S. 224.

(*f*) *Taylor* v. *Cartwright*, 14 Eq. 167, 176.

(*g*) *Powys* v. *Mansfield*, 3 My. & Cr. 359, 376.

nor where the gifts differ in character or purpose.

There will be no ademption where the gifts in question are of different characters, or are expressed to be given for different purposes. Thus a legacy was held to be not adeemed by the grant of an annuity (*h*), or by an advancement which depended upon a contingency (*i*), and a legacy of £500 was not adeemed by a subsequent gift of a part of the testator's stock-in-trade (*k*); but an admission of a son to a share of partnership capital has more recently been held to effect an ademption (*l*). But in all such cases the intention will be enquired into, and will govern the result (*m*).

2. *The satisfaction of portions by legacies.*

In the above cases, the question was whether a gift having been made by will was satisfied by a subsequent advancement made or portion given *inter vivos*. We now come to the converse question, whether a portion having been contracted to be given is satisfied by a subsequent legacy.

One of the leading authorities on this branch of the subject is *Hinchcliffe* v. *Hinchcliffe* (*n*), from which we learn that most of the rules which we have seen to be applicable in cases of ademption are of equal authority here. Thus here also the foundation of the doctrine is the distaste with which equity regards double portions; and consequently this species of satisfaction, as well as ademption, is *primâ facie* applicable only as between children and a parent or person *in loco parentis*. From the same case, also, we observe that slight circumstances of difference will not suffice to prevent the operation of the usual presumption.

The similarity between the two classes of cases is further seen from the important case of *Thynne* v. *Earl of Glengall* (*o*), in which a residuary bequest was held to be a

(*h*) *Watson* v. *W.*, 33 Beav. 574.
(*i*) *Spinks* v. *Robins*, 2 Atk. 493.
(*k*) *Holmes* v. *H.*, 1 Bro. C. C. 555.
(*l*) *Lawes* v. *L.*, 20 Ch. D. 81; *Vickers* v. *V.*, 37 Ch. D. 526; *Bengough* v. *Walker*, 15 Ves. 507.
(*m*) See *Lacon* v. *L.*, (1891) 2 Ch. 482; 60 L. J. Ch. 403.
(*n*) 3 Ves. 516.
(*o*) 2 H. L. 131.

satisfaction of a covenant to bestow a certain portion on a daughter, notwithstanding some important differences in the limitations.

Presumption more easily rebutted than in ademption.

It does, however, seem that in these cases, where the settlement precedes the will, the presumption against double portions will be more easily rebutted than where the will precedes the settlement. Thus in a well-known case it has been said:—"The rule against double portions "is but a rule of presumption, and there is much less "difficulty in supposing that it was not intended to pre- "vail where the person to whose dispositions it is to be "applied had not the power to enforce it without the con- "sent of others, than in a case where the whole was under "his absolute control. When the will precedes the settle- "ment, it is only necessary to read the settlement as if the "person making the provision had said, 'I mean this to be "in lieu of what I have given by my will.' But if the "settlement precedes the will, the testator must be under- "stood as saying, 'I give this in lieu of what I am already "bound to give, if those to whom I am so bound will "accept it.' It requires much less to rebut the latter pre- "sumption than the former" (*p*).

Principle resembles ademption

These expressions indicate the principal difference between these cases of the satisfaction of a portion by a legacy, and the ademption of a legacy by a portion. Where the settlement comes first, the persons entitled under it are purchasers, and no presumed intention of the testator can deprive them of their rights thus acquired. At least, they have a right to elect between the benefit which by the settlement is already theirs, and that conferred by the will. If the beneficiary elects to take under the will, then, unless something rebuts the presumption against double portions, the settlement is superseded, and is not to be performed at all. If he elects to claim his rights under the settlement, then, in the same circum-

(*p*) *Per* Lord Cranworth, in *Chichester* v. *Coventry*, L. R. 2 H. L. 71.

stances, he must to that extent give up his rights under the will to compensate those whom his election disappoints (*q*).

rather than satisfaction of debts.

It might, perhaps, be supposed that the recipient of a portion under a settlement being a purchaser, this species of satisfaction would be more analogous to the satisfaction of a debt by a legacy than to the ademption of a legacy by a portion. This, however, is not the case. For though a portion is in its legal aspect a debt, equity still regards it as a benefit conferred; and thus it falls within the presumption against double portions, which has, of course, no application in the case of an ordinary debt. The consequence is, that the leaning of equity is strongly in favour of the satisfaction of a portion by a legacy; while, as we shall presently observe, it is equally decided against the satisfaction of a debt by a legacy. This distinction is in itself abundantly sufficient to bring the cases we are now considering nearer to the doctrine of ademption than to that of satisfaction, as applied to ordinary debts.

Partial satisfaction.

A provision made by a will may satisfy one part of a covenant without satisfying the whole. Thus, if the covenant gives a life interest to a daughter, with remainder to children, a legacy to the daughter may satisfy her life interest, but cannot satisfy the claim of the children (*r*). And similarly, there may be a satisfaction to the children's portion, not touching that of the parent (*s*).

Gift by will not equivalent to advancement in lifetime.

Where a settlement contained a declaration that an advancement by the parent in his lifetime should be considered as satisfaction of a portion covenanted to be bestowed, a legacy given by will was considered not to be equivalent to an advancement in the lifetime so as to come within the declaration; and there was held to be no satisfaction (*t*).

(*q*) *Chichester* v. *Coventry*, *inf.*; *M'Carogher* v. *Whieldon*, 3 Eq. 236.

(*r*) *Bethell* v. *Abraham*, 3 Ch. D. 590.

(*s*) *Chichester* v. *Coventry*, L. R. 2 H. L. 71, 92; *Mayd* v. *Field*, 3 Ch. D. 587.

(*t*) *Cooper* v. *C.*, 8 Ch. 813.

Save as here excepted, it may be generally understood that the limitations and conditions of the principle above stated as applicable to ademption, are applicable also in the case of satisfaction of a portion by a legacy (*u*).

Rules as to extrinsic evidence.

There has been a great deal of learned argument touching the admissibility of extrinsic evidence (that is, evidence of facts not contained in the instruments themselves) in order to decide for or against the application of the doctrine of satisfaction; but the results of the cases are reducible to a few simple principles.

1. Not admitted to vary written instruments.

(1.) Parol evidence of extrinsic circumstances is not admitted to alter, add to, or vary a written instrument, or to prove with what intention it was executed. In *Hall* v. *Hill* (*x*) the question was whether a portion had been satisfied by a legacy. It was clear that in the absence of extrinsic evidence of the testator's intention when he made his will there would be no satisfaction. Evidence was tendered which clearly showed that the testator in fact intended the legacy to satisfy the portion. The evidence was rejected on the ground that it had nothing to do with the debt, but applied to the will only, and, in fact, amounted to the insertion in the will of a declaration which was not there.

2. Admitted to rebut presumption of law.

(2.) But where the law presumes a certain intention from collateral circumstances, such as a certain relationship between the parties, then extrinsic evidence is admissible to rebut this presumption. It was said in *Kirk* v. *Eddowes* (*y*), that where "the law raises a presumption " that the second instrument was an ademption of the gift " by the instrument of earlier date, evidence may be gone " into to show that such presumption is not in accordance " with the intention of the author of the gift" (*z*).

(*u*) *Bellasis* v. *Uthwatt*, 1 Atk. 427; *Lethbridge* v. *Thurlow*, 15 Beav. 334; *Sparkes* v. *Cator*, 3 Ves. 530.

(*x*) 1 D. & War. 94.

(*y*) 3 Ha. 509.

(*z*) See also *Debeze* v. *Mann*, 2 Bro. C. C. 165, 519; *Leveson* v. *Beales*, (1891) 3 Ch. 422; 60 L. J. Ch. 793.

3. When so admitted, counter-evidence admissible.

(3.) Where evidence is admissible to rebut such presumption, counter-evidence is admissible (*a*).

In *Kirk* v. *Eddowes* (*b*) the question was whether a legacy was *pro tanto* adeemed by a subsequent gift of a promissory note made without any writing. Evidence was tendered which related to this gift, not to the written instrument; and it was held that evidence of such a nature being admissible to rebut the presumption of law, counter-evidence was admissible in support of the presumption (*c*).

3. *Repetition of legacies.*

Repetition of legacies.

In many respects similar to the ademption of legacies by portions, and the satisfaction of portions by legacies, are the cases which arise when two legacies are given by the same will, or by a will and codicil, and it is doubtful whether the second legacy is intended to be additional to the first, or to be merely a repetition.

The case most usually referred to on this subject is *Hooley* v. *Hatton* (*d*).

In this case Lady Finch gave to Lydia Hooley, the plaintiff, £500 by her will. She made a codicil in these words: "I add this codicil to my will: I give Lydia "Hooley £1,000." The plaintiff filed a bill claiming these legacies, and the question was whether she was entitled to them both, or only to the £1,000. There being no internal evidence touching the question, it was decided on the general rule of law that the legacies were cumulative, and the plaintiff was declared entitled to them both.

Classification in *Hooley* v. *Hatton*.

The judgment of Aston, J., in this case classified double legacies under four heads: (1) where the same specific thing is given twice; (2) where the like quantity is given twice; (3) where a greater sum is given first, and a less

(*a*) See also *Debeze* v. *Mann*, 2 Bro. C. C. 165.

(*b*) 3 Ha. 509.

(*c*) See *Palmer* v. *Newell*, 20 Beav. 32, 39.

(*d*) 1 Bro. C. C. 390, n.; 2 W. & T. L. C. 321.

sum afterwards; (4) where a smaller sum is given first, and a greater sum afterwards.

Specific legacy.

The first case presents no difficulty, since where the same specific thing or *corpus* is twice expressed to be given, whether in the same or in different instruments, it must clearly be regarded as a repetition (*e*).

Legacies of quantity.

The remaining three classes may be most conveniently considered together, distinguishing, however, those cases in which the two gifts are contained in the same instrument from those in which they are given by two instruments.

In same instrument.

(1.) Where two pecuniary legacies are given by the same instrument.

If equal, repetition.

The general rule is that when two legacies of the same amount are given by the same instrument there will be considered to be a repetition, and one only will be good (*f*). And the same rule applies to annuities (*g*).

If unequal, not so.

But where the two legacies are of unequal amount, whether the greater precedes the less, or the less the greater, they are *primâ facie* cumulative (*h*).

In different instruments.

(2.) Where two pecuniary legacies are given by different instruments.

The rules regulating these cases cannot be so simply stated.

Primâ facie cumulative.

Primâ facie, if the legacies are given *simpliciter*, no motive for the gift being expressed, they are regarded as cumulative; and it is immaterial whether they are of equal or unequal amount (*i*). *A fortiori* they will be cumulative when there is any difference in their nature or time of payment (*k*), or they are given upon or for different trusts or purposes (*l*).

(*e*) *D. of St. Albans* v. *Beauclerk*, 2 Atk. 636; *Suisse* v. *Lowther*, 2 Ha. 432.

(*f*) *Garth* v. *Meyrick*, 1 Bro. C. C. 30.

(*g*) *Holford* v. *Wood*, 4 Ves. 76.

(*h*) *Windham* v. *W.*, Rep. t. Finch, 267; *Hartley* v. *Ostler*, 22 Beav. 449.

(*i*) *Roch* v. *Callen*, 6 Ha. 531; *Russell* v. *Dickson*, 4 H. L. 293; *Wilson* v. *O'Leary*, 12 Eq. 525; 7 Ch. 448.

(*k*) *Hodges* v. *Peacock*, 3 Ves. 735; *Masters* v. *M.*, 1 P. Wms. 421.

(*l*) *Saurey* v. *Rumney*, 5 De G. & S. 698; *Spire* v. *Smith*, 1 Beav. 419.

If equal and on same motive, repetition.

If, however, the same motive is expressed for both gifts, and the same sum is given, then, though the gifts are contained in two instruments, there will be deemed to be a repetition, and only one will be payable (*m*).

Not otherwise.

But if the same sums are given and different motives are expressed (*n*), or if the same motive is expressed and different sums are given (*o*), then the two gifts will be considered cumulative.

(3.) Such are the general rules, but they are subject to modification according to the evidence which may be forthcoming as to the testator's intention.

Intrinsic evidence.

As to intrinsic evidence there is no difficulty; it is always available to explain the intention. Thus the fact that the second instrument expressly refers to the first, or seems to be merely a copy of it, may, even where the sums given are unequal, lead to the conclusion that the second was intended to substitute, and not to be added to, the first (*p*). And similarly, where two precisely similar codicils were executed at the same time, it was considered that the intention was to execute them in duplicate, and not to give double legacies (*q*). The same conclusion was reached where two precisely similar instruments were executed, though at different times (*r*).

Extrinsic evidence.

The rules as to extrinsic evidence are similar to those above stated as ordinarily applicable in a case of satisfaction or ademption. Where the Court raises the presumption against double legacies (*e.g.*, where two equal legacies are given by one instrument, or in different instruments with the same motive expressed), then such evidence is admissible to show that the testator intended both to be paid.

But where the Court does not raise this presumption

(*m*) *Hurst* v. *Beach*, 5 Madd. 351, 358; *Roch* v. *Callen*, 6 Ha. 531.

(*n*) *Ridges* v. *Morrison*, 1 Bro. C. C. 388.

(*o*) *Hurst* v. *Beach*, *sup.*

(*p*) *Martin* v. *Drinkwater*, 2 Beav. 215; *Coote* v. *Boyd*, 2 Bro. C. C. 521.

(*q*) *Whyte* v. *W.*, 17 Eq. 50.

(*r*) *Hubbard* v. *Alexander*, 3 Ch. D. 738.

(*e.g.*, where legacies of different amounts are given by the same will, or legacies of the same amount *simpliciter* by different instruments), then extrinsic evidence is not admissible to show that the testator intended only the latter to be paid (*s*).

In short, extrinsic evidence is admissible in favour of, but not against, a legatee claiming the legacies as cumulative.

Substituted legacy subject to condition of first.

As a general rule, where one legacy is given merely in substitution for another, it will, in the absence of any expression of a contrary intention on the part of the testator, be liable to the same incidents as the legacy for which it is substituted (*t*); but this is, of course, not so where the second legacy is a distinct and substantive bequest (*u*). An additional legacy, though not so expressed, will in general be held subject to the same incidents and conditions as the first legacy. Thus if a legacy be given by will to a married woman to her separate use, an additional legacy given by the codicil will also be held for her separate use (*x*). In no case, however, has it been held that the latter gift is to go to the parties entitled under the subsequent limitations of the former gift (*y*).

II. *Where the Claim alleged to be satisfied is of a Legal Nature.*

1. *Satisfaction of debts by legacies.*

The leading authority on this branch of the subject is *Talbot* v. *The Duke of Shrewsbury* (*z*), where the principle is laid down that if a debtor, without taking notice of the

(*s*) *Hurst* v. *Beach*, *sup.*; *Guy* v. *Sharp*, 1 My. & K. 589.
(*t*) *Cooper* v. *Day*, 3 Mer. 154.
(*u*) *Chatteris* v. *Young*, 2 Russ. 183.
(*x*) *Day* v. *Croft*, 4 Beav. 561.
(*y*) *Mann* v. *Fuller*, Kay, 624.
(*z*) Prec. Ch. 394; 2 W. & T. L. C. 352.

debt, bequeaths a sum as great as, or greater than the debt, to his creditor, this is to be deemed a satisfaction of the debt; but that a legacy of less amount than the debt is not regarded as a satisfaction *pro tanto*, nor will a contingent legacy ever operate as a satisfaction.

Satisfaction depends on presumed intention. Slight circumstances rebut the presumption.

These cases rest, as do all cases of satisfaction, on the presumed intention of the donor, and they illustrate the maxim, *Debitor non presumitur donare*. But the reasoning upon which the principle here rests has been often pronounced to be artificial and unsatisfactory, and the inclination of the Court is decidedly against its application, so that slight circumstances will be laid hold of to rebut the presumption.

That this is so is well shown by *Chancey's Case* (*a*), in which a testator being indebted to his servant for wages, had given her a bond for £100 as due on that account, and afterwards by his will gave her £500 for her long and faithful services, and directed that all his debts and legacies should be paid. This last direction was considered sufficient to rebut the presumption of satisfaction, and the servant was held entitled to be paid both the bond and the legacy in full.

(1.) An examination of the cases will show that the principle of satisfaction as applied to debts is subject to many limitations. In the following cases the presumption of satisfaction has been held to be rebutted by the nature of the legacy:—

Presumption rebutted by the nature of the legacy.

Where legacy is less than debt,

(i.) Where the legacy is of less amount than the debt. In such cases there is no satisfaction, even *pro tanto* (*b*).

or legacy is contingent,

(ii.) Where the legacy is given upon a contingency (*c*).

or uncertain, such as residue.

(iii.) Where the legacy is of an uncertain or fluctuating amount; such as a gift of the whole or part of the testator's residue. Such a legacy will not operate as satisfac-

(*a*) 1 P. Wms. 408; 2 W. & T. L. C. 353.
(*b*) *Talbot* v. *Shrewsbury*, Prec. Ch. 394; *Crichton* v. *C.*, (1895) 2 Ch. 853.
(*c*) *Ibid.*; *Crompton* v. *Sale*, 2 P. Wms. 553.

tion, even though in the event it may happen to equal or exceed the amount of the debt (*d*).

(iv.) Where the time fixed for payment of the legacy is different from that at which the debt is due, so as to be not equally advantageous to the creditor, there will be no satisfaction (*e*): in this case the debt being due at the death, the legacy was directed to be paid one month after the death. Where the legacy has been payable before the debt has become due, it has been held to operate as satisfaction (*f*). Where the time of payment differs,

(v.) There will be no satisfaction where the testamentary gift differs from the gift in character. Thus a gift of land will not satisfy a pecuniary debt (*g*); a legacy will not satisfy an annuity (*h*); nor will an absolute gift satisfy a debt held on trust for the donee for life with remainder to his children (*i*). or the character of the gift differs.

(2.) Sometimes the presumption of satisfaction is rebutted by the nature of the debt. Thus:— Presumption rebutted by the nature of the debt.

(i.) A contingent or uncertain debt, such as a debt upon an open account, cannot be satisfied by a legacy (*k*). But the mere fact that a debt is under certain circumstances liable to be varied in amount will not always prevent the presumption of satisfaction. Thus, there was held to be satisfaction where a sum of money had been deposited with the testator, against which the creditor had drawn on him from time to time (*l*). Where debt is contingent or uncertain,

(ii.) A debt contracted subsequently to the making of the will cannot be satisfied by a legacy conferred by the will, since in such a case no intention to satisfy the debt can be reasonably presumed (*m*). And where a separation or is contracted subsequently to the will.

(*d*) *Devese* v. *Pontet*, 1 Cox, 188; *Thynne* v. *E. of Glengall*, 2 H. L. 154.
(*e*) *Clark* v. *Sewell*, 3 Atk. 96; *Calham* v. *Smith*, (1895) 1 Ch. 516; 64 L. J. Ch. 325.
(*f*) *Wathen* v. *Smith*, 4 Mad. 325.
(*g*) *Eastwood* v. *Vinke*, 2 P. Wms. 614.
(*h*) *Cole* v. *Willard*, 25 Beav. 568.
(*i*) *Fairer* v. *Park*, 3 Ch. D. 309.
(*k*) *Rawlins* v. *Powell*, 1 P. Wms. 297.
(*l*) *Edmunds* v. *Low*, 3 K. & J. 318.
(*m*) *Cranmer's Case*, 2 Salk. 508.

deed contained a covenant to pay a certain sum, and the covenantor by his will made contemporaneously bequeathed a like sum to the covenantee, there was held to be no satisfaction, the fact of the documents being contemporaneous being regarded as evidence of a contrary intention (*n*).

Presumption rebutted by expressions in the will.

(3.) In other cases it is gathered from expressions in the will that satisfaction was not intended. Thus:—

Where a particular motive is expressed, or there is a direction for payment of debts and legacies.

(i.) The fact that the testator has assigned a particular motive for the gift has been considered to rebut the presumption (*o*).

(ii.) In *Chancey's Case* (*p*) an express direction for the payment of debts and legacies was taken as an indication that the testator intended both the debt and legacy to be paid (*q*). A direction to pay debts alone has recently been held to have the same effect (*r*); *à fortiori* would this be so if there are other circumstances tending to rebut the presumption (*s*).

Relationship of parent and child immaterial.

The relationship of parent and child or husband and wife does not, it seems, affect the principle regulating these cases of satisfaction. Where there is an actual debt due to the child, as distinguished from a portion, it will only be satisfied by a legacy of equal or greater amount, and, as in other cases, the presumption will be easily rebutted (*t*).

2. *Satisfaction of debts by portions.*

Satisfaction of debt by portion.

Analogous to the above instances of satisfaction, and subject to similar rules, is the case in which a father, being

(*n*) *Horlock* v. *Wiggins*, 39 Ch. D. 142; 58 L. J. Ch. 46.

(*o*) *Mathews* v. *M.*, 2 Ves. sr. 635; *Charlton* v. *West*, 30 Beav. 124.

(*p*) 1 P. Wms. 408.

(*q*) *Richardson* v. *Greese*, 3 Atk. 65.

(*r*) *Bradshaw* v. *Huish*, 43 Ch. D. 260; 59 L. J. Ch. 135, disapproving *Edmunds* v. *Low*, 3 K. & J. 318.

(*s*) *Rowe* v. *R.*, 2 De G. & S. 297; *Pinchin* v. *Simms*, 30 Beav. 119.

(*t*) *Tolson* v. *Collins*, 4 Ves. 483; *Fowler* v. *F.*, 3 P. Wms. 353; *Atkinson* v. *Littlewood*, 18 Eq. 595.

indebted to a child, makes an advance to him in his lifetime. The portion so advanced will *primâ facie* effect a satisfaction if it equals or exceeds the amount of the debt (*u*).

Quære whether extrinsic evidence admissible.

It is a common and well-known principle that extrinsic evidence is admissible to rebut a presumption of law (*x*), and on this principle extrinsic evidence should be admissible when the presumption arises that a debt is satisfied by a legacy to rebut this presumption (*y*). But such evidence has nevertheless been sometimes refused (*z*).

Performance.

The equitable doctrine of *Performance* has some points of resemblance to, but yet must be carefully distinguished from, that of Satisfaction, as applied to the cases we have been considering.

Distinction between satisfaction and performance.

Satisfaction, as we have seen, wholly rests upon an implied intention of the testator; and several rules of presumption have been adopted which do not apply to cases of performance. The presumption will not hold if the gift is less beneficial in any way than the debt.

Performance rests on the ground of natural justice.

The doctrine of performance rather arises from a construction which equity, in its regard for natural justice, puts upon certain circumstances, than from the implied intention of the party. "*Equity imputes an intention to fulfil an obligation.*" It is not, therefore, subject to any of those rules which originate in the design of correctly ascertaining a testator's intention. And it conspicuously differs from

(*u*) *Wood* v. *Briant*, 2 Atk. 521; *Plunkett* v. *Lewis*, 3 Ha. 316; *Lawes* v. *L.*, 20 Ch. D. 81.

(*x*) *Kirk* v. *Eddowes*, 3 Ha. 509; *Hall* v. *Hill*, 1 D. & W. 94.

(*y*) *Plunkett* v. *Lewis*, *sup.*; *Wallace* v. *Pomfret*, 11 Ves. 542; *Leveson* v. *Beales*, (1891) 3 Ch. 422; 60 L. J. Ch. 793.

(*z*) *Fowler* v. *F.*, *sup.*; *Hall* v. *Hill*, *sup.*

satisfaction as applied to debts, in that performance is commonly deemed to have been effected *pro tanto*.

Performance may be imputed from the acts of the covenantor.

1. The typical case of performance is where a person covenants to do a certain act, and this covenant is deemed to be performed by some subsequent act which wholly or approximately effects the same purpose, though it does not expressly refer or precisely conform to the covenant.

One of the most familiar cases on this point is *Wilcocks* v. *Wilcocks* (*a*).

There a person covenanted on his marriage to purchase lands of the value of £200 a year, and to settle them for the jointure of his wife and to the first and other sons of the marriage in tail. He purchased lands of that value, but made no settlement, so that on his death the lands descended to his eldest son. The eldest son filed a bill for a specific performance of the covenant; but it was held that the lands descended should be deemed a performance of the covenant.

Another similar case which further illustrates the doctrine is *Lechmere* v. *Earl of Carlisle* (*b*).

Lord Lechmere on his marriage covenanted to lay out within one year of the marriage £6,000 (his wife's portion) and £24,000, amounting in all to £30,000, in the purchase of freehold lands in possession in the south part of Great Britain, with the consent of the Earl of Carlisle and Lord Morpeth, to be settled on Lord Lechmere for life, remainder for so much as would amount to £800 a year to Lady Lechmere for her jointure, remainder to first and other sons in tail male, remainder to Lord Lechmere, his heirs and assigns for ever. Lord Lechmere was seised of some lands in fee at the time of his marriage, and after his marriage purchased some estates in fee of about £500 a year, some estates for lives, and some reversionary estates in fee expectant on lives; and he con-

(*a*) 2 Vern. 558; 2 W. & T. L. C. 389.

(*b*) 3 P. Wms, 227; Ca. t. Talb. 88.

tracted for the purchase of some estates in fee in possession. None of these purchases or contracts were effected with the consent of the trustees, there was no settlement made of any of the lands, and shortly afterwards Lord Lechmere died intestate. Thereupon a bill was filed by his heir for a specific performance of the covenant, and to have the £30,000 laid out in accordance therewith out of the personal estate. It was held by Lord Talbot, on appeal, reversing the decision of Sir J. Jekyll, M. R., that the freehold lands purchased, and contracted to be purchased, in fee simple in possession after the covenant ought to be considered as purchased in part performance of the covenant. The heir was therefore only entitled to a decree for the laying out of so much money as, together with the sum already so laid out and contracted to be laid out, would amount to £30,000.

Conclusions from the cases.

It will be observed that the lands possessed by the covenantor before the covenant, and lands purchased afterwards, but of a different nature from what was covenanted to be purchased, were not included in the performance; and further, that the consent of the trustees was deemed not to be an essential.

The doctrine has also been applied to a case in which the covenant was to pay money to trustees to be laid out by them in a purchase of land, and the covenantor himself purchased the land, and died intestate without having effected a settlement (*c*).

The same principle is applicable where the obligation arises from an Act of Parliament instead of from a covenant (*d*).

Purchase by trustees stands on higher ground.

Where trustees having trust money in their hands are under an obligation to lay it out in lands, any purchase by them will more readily than in other cases be deemed a performance of their obligation (*e*); though such cases

(*c*) *Sowden* v. *S.*, 1 Bro. C. C. 582.

(*d*) *Tubbs* v. *Broadwood*, 2 R. & M. 487.

(*e*) *Mathias* v. *M.*, 3 Sm. & G. 552.

usually fall under the still stronger rule that a *cestui que trust* is entitled to follow trust money if traceable, however it may have been converted (*f*).

Performance may result from the operation of law.

2. Another illustration of the doctrine of performance is where a person covenants to do an act and the covenant is in effect wholly or partially performed by the operation of law.

On this the leading authority is *Blandy* v. *Widmore* (*g*), where a man covenanted, previous to his marriage, to leave to his wife £620. He married, and died intestate, his wife's share under the intestacy being more than £620. The covenant was hereby deemed to be performed, so that the widow could not claim her share under the intestacy and £620 over and above as a debt under the covenant.

In this case the covenant was wholly satisfied; but it is equally clear that if the distributive share had been less than the sum covenanted to be paid it would be considered a performance *pro tanto* (*h*). The same principle has, moreover, been applied where the covenant has been that the executors should pay a sum of money, or that the money should be paid to trustees for the wife (*i*).

There are, however, three classes of cases which must be carefully distinguished from those which fall under this principle.

A general legacy or gift of residue is not generally performance.

(1.) Where the covenantor has made a will, and thereby conferred a gift either by way of general legacy or as a residue, such a gift will not generally be deemed a *performance* of a covenant to leave a certain sum (*k*). It depends on the circumstances above considered whether it would operate as a *satisfaction* (*l*).

Share in in-

(2.) Where the covenant is not to pay a gross sum, but

(*f*) *Taylor* v. *Plumer*, 3 M. & S. 562; *Lench* v. *L.*, 10 Ves. 511.

(*g*) 1 P. Wms. 323; 2 W. & T. L. C. 391.

(*h*) *Garthshore* v. *Chalie*, 10 Ves. 14, 16; *Goldsmid* v. *G.*, 1 Swanst. 211.

(*i*) *Lee* v. *D'Aranda*, 3 Atk. 419.

(*k*) *Haynes* v. *Mico*, 1 Bro. C. C. 129; *Devese* v. *Pontet*, 1 Cox, 188.

(*l*) *Sup.*, p. 523 *et seq.*

to give a life annuity, or the interest of a sum of money for life, such a covenant will not be performed by the devolution of a share under an intestacy (*m*). testacy not performance of covenant for annuity.

(3.) Where the covenant is to pay a sum in the covenantor's lifetime, and there is a breach of the covenant before the death, then the devolution of a share in intestacy will not amount to a performance (*n*). Here the covenant having been to pay the settlor's wife a sum of money two years after marriage, and not having been complied with, there was an actual debt due when the intestate died, between which and her claim as widow in the intestacy, the covenantee could not be put to her election. Performance does not apply to a debt due in testator's lifetime.

(*m*) *Couch* v. *Stratton*, 4 Ves. 391.
(*n*) *Oliver* v. *Brickland*, 1 Ves. sr. 1 ; cited 3 Atk. 420.

PART II.

WHERE THE JURISDICTION RESTS ON THE DISTINCTIVE PROCEDURE OF EQUITY.

INTRODUCTION.

It has been already pointed out and cannot be too strongly urged, that it is impossible to draw any strictly defined line between those matters in which the jurisdiction of equity has arisen from the distinctive character of its principles, and those in which it is to be ascribed to the superiority or peculiarity of its procedure.

In many of the subjects which have been treated in the preceding part, it has been necessary to anticipate much that would appropriately present itself now for consideration, but which could not, without serious inconvenience, have been severed from the connexion in which it there stands. For instance, the subject of mortgages could not be examined without investigation of the method of accounting between mortgagor and mortgagee: no more was it possible to take a comprehensive view of the doctrine of trusts without trespassing on many questions which most usually present themselves in the course of the administration of assets.

On the other hand, in those matters in which the jurisdiction of equity is essentially administrative, or is otherwise due to its peculiar procedure, it of course recognises and applies as occasion requires all the principles already expounded. Thus, actions arising out of partnerships

and in respect of public companies continually raise questions of trust and of fraud; and, as has been observed, the jurisdiction to relieve against the consequences of mistake is nowhere more frequently concerned than in actions for specific performance.

As it was necessary in introducing the first part of the work to inquire generally what the substantive principles were which distinguished equity from law, so it behoves us now to make a corresponding inquiry as to the distinctive Procedure of Courts of equity. This must necessarily be here treated in a very general way, for otherwise we should be involved in an exposition of Chancery practice, which is beyond the province of this work.

Account.

Perhaps the most extensively useful of the features of equitable procedure is the facility which it affords for the taking and adjusting of accounts. In actions at law, it was, under the old practice, necessary that the plaintiff should estimate his claim in a definite sum of money. Supposing the claim to be good in law, it was for the jury to determine on the facts whether the demand was reasonable or excessive in amount, and to give their verdict accordingly. Of course, it was open to the defendant to adduce evidence generally and particularly to show that the plaintiff's claim ought to be reduced; and simple cases of account might well be considered and adjusted by the jury. But it is evident that many cases arise in which the determination of what is justly due to a plaintiff necessarily involves long and difficult inquiries—for instance, it may be necessary to review a series of transactions extending over many years. For such an investigation a jury is clearly incompetent.

Procedure at common law.

Inapplicable to long accounts.

Action of account at law.

This difficulty was very long ago recognised, and a remedy for it attempted apart from the assistance of equity. Indeed, one of the most ancient actions at law was the action of account. But the inadequacy of the remedy thus afforded is sufficiently shown by mentioning only a few of the conditions attached to it. Thus, the action of account

Restrictions as to parties.

originally lay only where there was either privity in deed by the consent of the party, as against a bailiff or receiver appointed by the party; or a privity in law, as against a guardian in socage. By the law merchant it was so far extended that a merchant might have an account against another, charging him as a receiver. Beyond these limits the action did not apply, until by successive statutes it was further extended to the executors of merchants, to administrators, and finally, so as to lie against executors and administrators of guardians, bailiffs, and receivers (*a*).

Defects as to procedure.

Nor were these restrictions as to the parties the only disadvantages. Even when the action was sustainable, the procedure under it was cumbrous in the extreme. The auditors appointed to take the account could not until 3 & 4 Anne, c. 16, examine the parties before them on oath. Whenever a disputed item was in question the parties might join issue thereon or demur and bring their dispute before the Court, and thus the inquiry might be almost interminably protracted. Moreover, no equitable claims, such as those arising from trusts, liens, frauds, &c., were recognised; so that after all the discussion at law, a suit in equity might still have been requisite to determine the full rights of the case (*b*).

Displaced by the equitable remedy.

It is not surprising that the legal action of account should under these circumstances have fallen into desuetude, and have been displaced by the remedy in equity to which its imperfections gave birth. We shall presently consider in greater detail some of the leading principles by which Courts of equity have been guided in the taking of accounts. It suffices now to illustrate the superiority of the equitable over the legal remedy, by stating that the master who acted as auditor in equity had abundant power to examine the parties on oath, to make inquiries from all proper parties by testimony on oath, and to require the production of all necessary documents; and that his

Superiority illustrated.

(*a*) 3 & 4 Anne, c. 16; Story, 445. (*b*) Story, 448—9.

decision was open to be re-examined by the Court whether in point of fact or of law, by a simple and expeditious process (*c*).

Extent of the jurisdiction in equity.

The legal action of account having become obsolete, the jurisdiction of equity in all matters of complication was fully established, and, as usual, being once established, it was in no way interfered with by the fact that new powers were subsequently conferred on Courts of law; for instance, the power to compel a reference to arbitration under the Common Law Procedure Act, 1854 (*d*). The general test as to whether Courts of equity had jurisdiction in any particular case seems to have been the question whether or not the account could be competently examined upon a trial at *nisi prius* (*e*).

Fiduciary relations give jurisdiction.

In some cases it was necessary for the parties to resort to equity because of the existence of some fiduciary relation between them which prevented the application of a legal remedy. Thus a principal desiring an account against his agent could only obtain adequate relief in equity, since equity alone could enforce the discovery necessary to ascertain the facts of the case (*f*); in short, wherever the relation of trustee and *cestui que trust* exists the matter naturally falls under the jurisdiction of equity (*g*). An agent, however, could not sue in equity for an account against his principal, since no confidence is reposed by the agent, and the same ground of jurisdiction did not therefore exist (*h*).

Account incident to injunction.

In many cases, again, the remedy of account is incident to and accompanies that of injunction—for instance, in suits for the infringement of patents of copyright, and in respect of waste. These cases are more particularly referred to under the head of Injunction.

(*c*) See Ord. LV. rr. 15 *et seq.*

(*d*) 17 & 18 Vict. c. 125, s. 3.

(*e*) *O'Connor* v. *Spaight*, 1 S. & L. 305; *Taff Vale Co.* v. *Nixon*, 1 H. L. 111.

(*f*) *Mackenzie* v. *Johnston*, 4 Mad. 373.

(*g*) *Docker* v. *Somes*, 2 My. & K. 664.

(*h*) *Padwick* v. *Stanley*, 9 Ha. 627.

Since the Judicature Acts, questions as to *jurisdiction* can, of course, no longer arise, all actions being equally cognizable in both the Common Law and Chancery Divisions. But it remains a matter of propriety and convenience to resort to equity in such cases, the machinery of the equity Courts and Chambers being peculiarly adapted to the examination of complicated matters of detail.

Extent of the jurisdiction founded on account.

It is obvious that the jurisdiction of equity in matters of account brings a great variety of business within its purview. This is a natural consequence of the fact that an almost infinite variety of transactions involve questions of account; and, in addition to this, it is a well-established rule that when equity acquires jurisdiction on this ground, it extends its authority to other matters naturally, if not necessarily, attaching to such a jurisdiction. As incident to accounts, therefore, Courts of equity take "cognizance "of the administration of personal assets, consequently of "debts, legacies, the distribution of the residue, and the "conduct of executors and administrators. As incident to "accounts, they also take the concurrent jurisdiction of "tithes, and all questions relating thereto; of all dealings "in partnership, and many other mercantile transactions; "and so of bailiffs, factors, and receivers" (*i*).

In dealing with the matters thus suggested, our course will be first to examine the most conspicuous of the principles by which equity is guided in the taking of accounts generally. Then we shall inquire with more particularity into the matters generally enumerated in the last paragraph, whose place in equitable jurisprudence is especially due to their involving matters of account.

Though we shall thus find that the heading of account is answerable for the greater part of the business which falls within the second division of our subject, there are other peculiar remedies or features of procedure which are scarcely less fertile, but which do not call for particular comment in this place.

(*i*) Blackstone, Com. III. 437.

Partition. Somewhat analogous in principle to the taking of account is the partition of lands, involving as it does Boundaries. minute inquiries and valuations. And very similar to this is the settlement of doubtful and confused boundaries.

Specific performance. Another remedy of high importance, and the administration of which exemplifies some of the most important doctrines of equity, is that of Specific Performance, that is, the compelling a party to do specifically that which, from Injunction. an equitable point of view, he ought to do. In some respects analogous to this is the remedy of Injunction, by which a party is restrained from doing acts which inequitably affect the natural or contractual rights of others.

The discussion of these remedies and the matters connected therewith is before us as constituting the second division of our subject.

CHAPTER I.

THE GENERAL PRINCIPLES OF ACCOUNT.

Legal and equitable claims regarded.

It has already been stated, and is very natural, that in taking an account, Courts of equity pay equal regard to legal and equitable claims. Wherever any fraudulent dealing has given rise to a constructive trust, or to an equitable claim in any way, or by the dealings of the parties an equitable lien has been created, or indeed any doctrine of equity intervenes to modify the legal position of the parties, full effect is given thereto, and the result of the inquiry is therefore, when confirmed by the Court, final, needing no supplemental proceedings to complete the determination of the parties' rights.

I. *Appropriation of Payments.*

Appropriation of payments.

The accounts which come before Courts of equity are frequently of such a nature as to call for decision as to the appropriation of payments appearing on one side thereof, to the debits appearing on the other. In other words, it often becomes material to ascertain to what debt a particular payment made by a debtor is to be applied. This question most commonly arises where there have been running accounts between debtor and creditor, various payments having been made and various credits given at different times.

Clayton's Case. Rules as to appropriation.

The leading authority on this point is *Clayton's case* (*a*), from which we learn that the following rules, which are mainly derived from the Roman law, are applicable in equity.

Debtor has first option.

1. A debtor making a payment has a right to appropriate it to the discharge of any debt due to his creditor.

The debtor may appropriate the payment by so stipulating in express terms (*b*), or his intention so to do may be inferred from the circumstances of the transaction; thus where one of the debts owing was secured and another unsecured, an intention first to discharge the secured debt was presumed (*c*).

Compared with Roman law.

In the Roman law this case would have come under another rule—viz., that in the absence of an express appropriation by either debtor or creditor, the law would appropriate the payment to the most burdensome debt. This rule does not, however, appear to be recognised in English law (*d*), and it therefore seemingly requires something more than the mere fact that one of the debts is secured, to lead the Court to appropriate a payment to its extinction in

(*a*) 1 Mer. 572, 585.

(*b*) *Exp. Imbert*, 1 De G. & J. 152.

(*c*) *Young* v. *English*, 7 Beav. 10.

(*d*) *Mills* v. *Fowkes*, 5 Bing. N. S. 455, 461; *Att.-Gen. of Jamaica* v. *Manderson*, 6 Moo. P. C. 239.

priority to an unsecured debt of earlier date. In the case quoted it appears that the payment was made out of the proceeds of the security itself.

This right of appropriation by the debtor is, however, lost *unless exercised at the time of payment*. If he does not then declare on what account the money is paid, he cannot afterwards do so (*e*). Debtor can only exercise his right at time of payment.

2. If at the time of payment there is no express or implied appropriation thereof by the debtor, then the creditor has a right to make the appropriation. The creditor then has an option.

In Roman law this right of the creditor, like the corresponding one of the debtor, was lost unless exercised at the time of payment (*f*). But in English law this is not so; and the creditor may, it seems, make the appropriation at any time after payment and before action brought or account settled between him and his debtor (*g*). Exercisable at any time before action brought.

The creditor's right to make such appropriation is, however, subject to some limitations. He may not indirectly secure payment of an illegal debt by appropriating a general payment to its discharge (*h*). But a debt barred by the Statute of Limitations is not illegal, the statute being merely a bar to the remedy, not to the right: and if, therefore, a general payment is made, without appropriation by the debtor, it may be appropriated by the creditor to the discharge of a statute-barred debt (*i*). It must, nevertheless, be observed that it will not have the effect of reviving the debt (*i*); or, in other words, though by the appropriation the creditor may secure payment of a portion of a statute-barred debt, he does not by that means acquire a right of action for the remainder of it. But if a debt is not barred, a general payment on account appropriated towards its liquidation will take it May not appropriate to an illegal debt, but may to a debt statute-barred. Effect of this.

(*e*) *Wilkinson* v. *Sterne*, 9 Mod. 427.
(*f*) Dig. 46, 3.
(*g*) *Philpot* v. *Jones*, 2 A. & D. 41, 44; *Simson* v. *Ingham*, 2 B. & C. 65; *Friend* v. *Young*, (1897) 2 Ch. 421; 66 L. J. Ch. 737.
(*h*) *Wright* v. *Laing*, 3 B. & C. 165.
(*i*) *Mills* v. *Fowkes*, *sup.*; *Nash* v. *Hodgson*, 1 Jur. N. S. 946; 4 De G. M. & G. 474.

out of the operation of the statute; that is to say, the statutory period will again commence to run from the time of such payment and appropriation (*k*).

Appropriation by presumption of law according to priority.

3. In the absence of any appropriation by either debtor or creditor, an appropriation is made by presumption of law, according to the order of the items of account, the first item on the debit side being the item discharged or reduced by the first item on the credit side (*l*). This is the express point decided, and is commonly known as "the rule" in *Clayton's case* (*m*), and is abundantly confirmed by subsequent authority (*n*).

Presumption may be rebutted.

The rule, however, is only applicable where there is an account current between the parties (*o*), and the presumption may be rebutted by evidence of a different intention (*p*); and thus, though the English rule falls short of that of Roman law already mentioned, there is a tendency in the same direction arising from the disposition to impute an intention to a debtor to appropriate his payment to the most onerous debt. The presumption may also be rebutted by the circumstances of the particular case. Thus, where an account was guaranteed, and after the guarantee came to an end through the death of the guarantor, a new account was opened with the debtor, and the debtor made payments without specific appropriation, it was held that the creditor was not bound to appropriate such payments to the guaranteed debt, so as *pro tanto* to release the estate of the guarantor (*q*), the rule in *Clayton's case* only applying where there is a continuous unbroken account. Neither does the rule apply where a trustee or person holding money in a fiduciary character pays such money

(*k*) *Nash* v. *Hodgson*, 4 De G. M. & G. 474; *Friend* v. *Young*, (1897) 2 Ch. 421; 66 L. J. Ch. 737.

(*l*) Coote, Mtges., p. 1224, ed. 5.

(*m*) 1 Mer. 585.

(*n*) *Pemberton* v. *Oakes*, 4 Russ. 154, 168; *Bk. of Scotland* v. *Christie*, 8 Cl. & F. 214.

(*o*) *Cory Bros.* v. *Owners of The Mecca*, (1897) A. C. 286; 66 L. J. P. 86.

(*p*) *City Discount Co.* v. *McLean*, 9 L. R. C. P. 692.

(*q*) *Re Sherry*, 25 Ch. D. 692, 702; 53 L. J. Ch. 404; *Rouse* v. *Bradford Bank*, (1894) 2 Ch. 32; A. C. 586; 63 L. J. Ch. 890.

to his account with a banker. In such a case the drawings out will be taken to be drawings of the debtor's own money in preference to the trust money. If the funds so paid in belonged to more than one *cestui que trust*, and there has been an unbroken account, the rule applies as between the *cestuis que trustent* themselves (*r*).

Payments appropriated to interest first.

Where a debt bearing interest stands against a debtor, general payments made by him are first to be applied in payment of interest, any balance beyond what is necessary for that being then credited in reduction of the principal (*s*). But this rule does not apply in the case of an overdrawn bank account, in which, by the practice of bankers, interest is from time to time converted into principal (*t*).

Presumption where some debts barred.

We have seen that a creditor may appropriate a payment towards the liquidation of a statute-barred debt. If, however, there are several debts owing to him, some barred and some not so, and he does not expressly appropriate a payment made to him on account towards those that are barred, the presumption of law is that the payment is to be attributed to those not barred (*u*). In this respect, therefore, in the absence of an express appropriation, the law appropriates the payment to the best interest of the debtor. This evidently operates as a modification of the general rule that payments are appropriated by law to debts in order of time. It scarcely needs to be remarked by way of caution that in a continuous and current account the early debts, however old, are not statute-barred, being kept alive from time to time by any payments which are made within six years of their having been incurred.

General effect of appropriation.

Questions of appropriation, perhaps, most frequently

(*r*) *Re Hallett's Estate*, 13 Ch. D. 696; *Hancock* v. *Smith*, 41 Ch. D. 456; 58 L. J. Ch. 725; *Wood* v. *Stenning*, (1895) 2 Ch. 433; *Mutton* v. *Peat*, (1900) 2 Ch. 79; 69 L. J. Ch. 484. See *Pennell* v. *Deffell*, 4 De G. M. & G. 372; *Exp. Dale*, 11 Ch. D. 772.

(*s*) *Chase* v. *Box*, Freem. 261. See *Cockburn* v. *Edwards*, 18 Ch. D. 449; 51 L. J. Ch. 46.

(*t*) *Parr's Bank* v. *Yates*, (1898) 2 Q. B. 460; 67 L. J. Q. B. 851.

(*u*) *Nash* v. *Hodgson*, *sup.*; *Friend* v. *Young*, *sup.*

arise in cases where a firm has from time to time been changed, and eventually fails. It is to such cases that the rule in *Clayton's case* especially applies. If a creditor seeks to fix a liability for the ultimate balance on a person who has been a partner during the currency of the account, but who is not so at the time of the failure, the account will be taken on the presumption that the sums first paid in have been first drawn out, or that the debts first incurred have been first discharged. And no liability can be fixed on a former partner if, on working out this principle, it appears that all the debts owing when he ceased to be a partner have been subsequently discharged.

II. *Appropriation of Securities.*

The rule in *Exp. Waring.*

Somewhat analogous in principle to the appropriation of payments is the doctrine of appropriation of securities to bills of exchange, which is applied when both drawer and acceptor of the bills become insolvent. The leading authority in cases of this description is the case of *Ex parte Waring* (*x*), in which Lord Eldon decided that, where, as between the drawer and acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor, then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, any person holding the bill is entitled to have the specifically appropriated security applied towards payment of the bill (*y*).

The following points must be observed as regulating the application of this rule :—

1. There must be a distinct appropriation of the security

(*x*) 19 Ves. 345.
(*y*) See rule in *Exp. Waring* by A. C. Eddis, p. 5; *Exp. Dever*, 14 Q. B. D. 611; 54 L. J. Q. B. 390.

in question to the bill or to the debt against which the bill is drawn (*z*). The mere fact, for instance, that on a shipment of goods from A. to B., A. draws a bill on B. as against the cargo will not amount to a sufficient appropriation; and the bill holder will not be entitled to the proceeds of the cargo as against a consignee who applies it in reduction of a debt due to him from the consignor (*a*). The question of appropriation is an inference of fact, not a conclusion of law.

2. The rule only applies when both drawer and acceptor are insolvent and their respective estates are under forced administration. If either the drawer or acceptor of the bill is solvent, the bill holder of course gets paid in full, and needs no security (*b*); and the Court will not, by applying the rule, deprive any person of any rights of property which he may possess, unless he is under the jurisdiction of the Court. Consequently, the rule did not apply when, under the former bankruptcy laws, one party, though insolvent, executed a composition deed, but made no cession of his property (*c*). But the rule applies where the two insolvent estates are being wound up in any forced administration, whether in the Chancery Division or in bankruptcy (*c*).

3. It is essential that there should be a right of double proof—*i.e.*, a right to prove against both the insolvent estates for the full amount of the bill or debt (*d*).

(*z*) *Exp. Banner*, 2 Ch. D. 278; *City Bank* v. *Luckie*, 5 Ch. 773.

(*a*) *Phelps, Stokes & Co.* v. *Comber*, 29 Ch. D. 813; 26 *ib.* 755; 54 L. J. Ch. 1017; *Brown, Shipley & Co.* v. *Kough*, 29 Ch. D. 845; 54 L. J. Ch. 1024.

(*b*) *Powles* v. *Hargreaves*, 3 De G. M. & G. 430, 450.

(*c*) *Ibid.*; *Exp. General S. American Co.*, 10 Ch. 635.

(*d*) *Vaughan* v. *Halliday*, 9 Ch. 569.

III. *Set-off.*

Set-off: There has been a marked distinction between the principles of law and equity as to the set-off of debts one against another.

at law. 1. Courts of law, indeed, always applied the principle of set-off to connected accounts of debit and credit, and allowed only the balance of the account to be recovered (*d*). But apart from legislation the principle was confined within very narrow limits. The mere existence of cross-demands between the same persons did not entitle one to set off the debt owing to him against that which he owed. Unless they were substantially connected one with the other, the respective creditors could only sue in independent actions. For instance, if A. was indebted to B. in the sum of £5,000 on a bond, and B. subsequently borrowed £4,000 from A. also on a bond, payable at a different time or under different conditions from that of A., there was no legal set-off between them, and B. could have sued A. and obtained and enforced judgment against him for the whole £5,000, even though it may have been certain that B. would be unable to pay his debt when it became payable.

Statutory improvements. It is unnecessary now to trace the steps by which the manifest imperfections of the law in this respect were from time to time removed by statutory interference (*e*). It suffices to say that the repugnance of its doctrines to natural equity sufficed to establish an equitable jurisdiction in many cases where set-off was reasonable, but was inadmissible at law, and the principle of the statutory amendments were preserved notwithstanding the repeal of the statutes (*f*).

Distinctions as to set-off in equity. 2. This jurisdiction was, however, subject to well-defined limitations, and generally followed the law. The cases in

(*d*) *Dale* v. *Sollet*, 4 Burr. 2133. (*e*) See 9 Geo. II. c. 22.
(*f*) 42 & 43 Vict. c. 59.

which equity differed from the law may generally be classed under one or other of three headings.

Where credit is mutual.

(1.) Notwithstanding that the debts in question arise from independent transactions, yet equity allows a set-off where, from the circumstances of the case, it appears that the party incurring the second debt acted in reliance on the former debt as a means of discharging it.

This is sometimes expressed by saying that though the debts are independent, the credit is mutual. It is illustrated by the case above put of the bonds given between A. and B. In such a case the nature of the transaction might well lead to the presumption that A. lent his money relying on the fact that on another account he was indebted to B., so that if B. should become insolvent A.'s advance should be esteemed a *pro tanto* payment of his liability. Equity gives effect to this presumption, though apart from the statutes referred to, it was disregarded at law (*g*). Similarly it was held at law under the statutes, that there was a mutual credit wherever one party being indebted to another entrusted him with goods, mutual credit being defined as meaning mutual trust, which must be presumed in such circumstances (*h*).

Where one of the debts is equitable,

(2.) Where there are cross-demands of such a nature that if both had been recoverable at law they would have been subject to set-off, then if one of the demands is of an equitable nature the principle of set-off is applicable in equity.

as formerly in assignments of debts.

This was the case where, prior to the Judicature Acts, a legal debt was owing to a plaintiff by a defendant, and the defendant was assignee of a legal debt due to a third person from the plaintiff; then if the debts were of such

(*g*) *Lanesborough* v. *Jones*, 1 P. Wms. 326; *Exp. Prescott*, 1 Atk. 230; and see *Taylor* v. *T.*, 20 Eq. 155; *Christmas* v. *Jones*, (1897) 2 Ch. 190; 66 L. J. Ch. 439.

(*h*) *Olive* v. *Smith*, 5 Taunt. 56; *Key* v. *Flint*, 8 *ib.* 21; *Roxburgh* v. *Cox*, 17 Ch. D. 520; 50 L. J. Ch. 772; *Newfoundland Govt.* v. *Newfoundland R. C.*, 13 App. Cas. 199; 57 L. J. P. C. 35; and R. S. C. 1883, O. XIX. r. 3.

a nature that they might have been set off in law under the statutes, they were subject to set-off in equity (*i*).

It is evident that this class of cases is rendered completely obsolete by the Judicature Acts.

Where there are special grounds.

(3.) There are certain cases where on special equitable grounds set-off is allowed in equity.

Debts occurring in different rights.

Thus, though in equity no more than at law is it permitted to set off debts accrued in different rights (for instance, a joint debt against a separate debt, or *vice versâ* (*k*); or a debt due from a person individually against a debt due to him as executor of another (*l*)), yet where a joint creditor has been guilty of fraud in relation to the separate property of one of the debtors—for instance, has misapplied it, and deceived the latter—it has been held, that in case of bankruptcy, the separate debt arising by such misapplication may be set off against the joint debt (*m*).

When joint and separate debts set-off fraud.

Suretyship.

So also in cases where one of the joint debtors has been only surety for the other, he may set off the debt due to his principal from the creditor; and, generally, a joint debt may in equity be set off against a separate debt where it is clear that joint credit was given on account of the separate debt (*n*).

On similar principles, though, generally speaking, a debt incurred by a person in his private capacity could not be set off against a debt due to him as executor or trustee (*o*), nor a debt due from a testator be set off against a debt due to his executor (*p*), yet special circumstances, such as an identity of interest in the two debts, may suffice to give a right of set-off, notwithstanding the formal difference as to the characters (*q*). The principles

(*i*) *Clarke* v. *Cort*, Cr. & Ph. 154; *Williams* v. *Davies*, 2 Sim. 461.

(*k*) *McEwan* v. *Crombie*, 25 Ch. D. 175; 53 L. J. Ch. 24; *Bowyear* v. *Pawson*, 6 Q. B. D. 540; 50 L. J. Q. B. 495.

(*l*) *Re Hodgson*, 9 Ch. D. 673; *Hallett* v. *H.*, 13 *ib.* 232. See *Elgood* v. *Harris*, (1896) 2 Q. B. 491; 66 L. J. Q. B. 53.

(*m*) *Exp. Stephens*, 11 Ves. 24; *Exp. Blagden*, 19 Ves. 465, 467.

(*n*) *Vulliamy* v. *Noble*, 3 Mer. 593, 621; *Exp. Stephens*, *sup.*

(*o*) *Freeman* v. *Lomas*, 9 Ha. 109; *Exp. Kingston*, 6 Ch. 632.

(*p*) *Lambarde* v. *Older*, 17 Beav. 542.

(*q*) *Bailey* v. *Finch*, L. R. 7 Q. B. 34.

of set-off have not been affected by the new procedure rules under the Judicature Acts (*r*).

(4.) *Vice versâ*, the equity of third persons will sometimes intervene to prevent a set-off, when otherwise it might have been allowed. Thus a shareholder in a limited company who is also a creditor, cannot, in the compulsory winding-up of the company, set off the amount due to him as creditor against the amount due from him for calls (*s*). He must pay his calls in full, and then stand on the same footing as other creditors in respect of the debt due to him; and the same rule, it seems, applies in a voluntary winding-up (*t*). For the same reason there is no set-off allowed in favour of directors who are creditors of the company (*u*). A set-off is allowable where a shareholder is bankrupt, whether the claim is made in the bankruptcy or in the winding-up; that is to say, whichever way the balance is (*x*). These cases are governed by the express enactment of the Bankruptcy Act, that in bankruptcy, where there have been mutual dealings between the bankrupt and a person proving in the bankruptcy, the sum due from one party shall be set off against any sum due from the other party (*y*). And when the company is the debtor, as for instance on debentures held by a shareholder, it is entitled to set off the debentures against calls made prior to the winding-up (*z*); unless, indeed, there is an intervening equity, as where the debentures have been effectually charged prior to the calls (*a*).

Set-off disallowed in winding-up;

allowed in bankruptcy.

(*r*) See cases, *infra;* O. XIX. r. 3.

(*s*) *Grissell's case*, 1 Ch. 528; Comps. Act, 1862 (25 & 26 Vict. c. 89), s. 101.

(*t*) *Re Whitehouse & Co.*, 9 Ch. D. 595; but see *Brighton Arcade Co.* v. *Dowling*, L. R. 3 C. P. 175.

(*u*) *Re Exchange Bank*, 21 Ch. D. 519; *Re Milan Tramways*, 25 *ib.* 587; 22 *ib.* 122. See *Re Washington Diamond Co.*, (1893) 3 Ch. 95; 62 L. J. Ch. 895; *Howard* v. *Rowatt's Wharf*, (1896) 2 Ch. 93.

(*x*) *In re Duckworth*, 2 Ch. 578; *Exp Strang*, 5 Ch. 492.

(*y*) 46 & 47 Vict. c. 52, s. 38; *Palmer* v. *Day & Son*, (1895) 2 Q. B. 618; 64 L. J. Q. B. 807; *Re Mid-Kent Fruit Co.*, (1896) 1 Ch. 567; 65 L. J. Ch. 250.

(*z*) *Christie* v. *Taunton*, (1893) 2 Ch. 175; 62 L. J. Ch. 385.

(*a*) *Christie* v. *Taunton*, *sup.*; and cf. *Hill* v. *Hicken*, (1897) 2 Ch. 579; 66 L. J. Ch. 717.

Cases dealing with the right of solicitors to set off with respect to costs have been already considered (*b*); and an executor's right of retainer will be discussed hereafter (*c*).

IV. *Apportionment.*

Apportionment.

The principles of equity applicable to account are further distinguished from those of law by its fuller application of the doctrine of apportionment.

Contracts.

Examples of this have already been given; for instance, in the case of an apprenticeship prematurely determined by bankruptcy (*d*). But it should be observed that there is no similar right when the contract has been put an end to by death (*e*). Other cases of contracts which were not divisible by law form equally apt illustrations: thus, if a contract to serve for a year for £100 was determined by death at the end of nine months, no remuneration at all could have been legally recovered (*f*). In such cases equity granted redress wherever it discovered circumstances of mistake, accident or fraud (*g*).

Rents.

Rents, again, were at common law not apportionable, and the consequences of this doctrine were continually productive of injustice when a tenant for life died in the interval between two rent days. The full consideration of the difficulties thus arising is not, however, here required, equity having so far followed the law as to render necessary a resort to the legislature (*h*). By the statutes 11 Geo. II. c. 19, and 5 Will. IV. c. 22, the greatest of the inconveniences were removed; and now, by the Apportion-

Apportionment Act, 1870.

(*b*) *Supra*, p. 324.
(*c*) *Infra*, p. 563.
(*d*) *Hale* v. *Webb*, 2 Bro. C. C. 78; *supra*, p. 238; 46 & 47 Vict. c. 52, s. 41.
(*e*) *Whineup* v. *Hughes*, L. R. 6 C. P. 78; *Ferns* v. *Carr*, 28 Ch. D. 409, overruling *Hirst* v. *Tolson*, 2 Mac. & G. 134.
(*f*) Story, 471; *Corp. of Plymouth* v. *Throgmorton*, 1 Salk. 65; 3 Mod. 153.
(*g*) Story, 472.
(*h*) But see *Meeley* v. *Webber*, cited 2 Eq. Abr. 704; *Aynsley* v. *Woodsworth*, 2 V. & B. 331.

ment Act, 1870 (*i*), it is provided that in future all rents and other periodical payments in the nature of income shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly (*k*). The Act applies to the case of a tenant for life dying since the Act, though taking under an instrument dated previously thereto (*l*). But its operation may, of course, be excluded by the language of an instrument dealing with the property (*m*), and in the case of an investment of trust funds which are limited to successive beneficiaries, there is in the absence of special circumstances no power to apportion profits already accrued for the benefit of the remaindermen; the tenant for life is entitled to the whole of the dividend when declared (*n*).

Previous to this Act, there were some cases in which apportionment might have been had in equity though not in law. Thus where portions were payable to daughters at eighteen or marriage, and until then maintenance was allowed, if a daughter came of age or married in the intermediate period, maintenance was apportionable in equity (*o*).

V. *Contribution.*

Contribution.

Lands subject to charge.

The principle of contribution, although in most cases recognized at common law, was capable of much more convenient application under the procedure of equity. At law, where lands subject to a charge were subjected to a partition, or sold in lots, one of the several owners paying

(*i*) 33 & 34 Vict. c. 35.
(*k*) S. 2.
(*l*) *Re Cline's Estate*, 18 Eq. 213; *Lawrence* v. *L.*, 26 Ch. D. 795; 53 L. J. Ch. 982.
(*m*) *Lysaght* v. *L.*, (1898) 1 Ch. 115; 67 L. J. Ch. 65; *Stone* v. *Meredith*, 67 L. J. Ch. 409.
(*n*) *Barker* v. *Perowne*, 18 Ch. D. 160; 50 L. J. Ch. 733. See *Bulkeley* v. *Stephens*, (1896) 2 Ch. 241; 65 L. J. Ch. 597; *Alston* v. *Houston*, (1901) 2 Ch. 584; 70 L. J. Ch. 869.
(*o*) *Hay* v. *Palmer*, 2 P. Wms. 501. See also *Lloyd* v. *Carr*, 45 Ch. D. 629; 60 L. J. Ch. 175.

the charge could recover contribution from the others; but his remedy lay in actions against them individually, whereas equity could ascertain the proportions, and finally determine the question by one judgment in one suit. It has been held that one tenant in common of a house who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution (*p*).

Other instances of the equitable application of the principle of contribution will be found in the Chapters on Sureties (*q*) and on Trustees (*r*).

VI. *Defences to an Action for Account.*

Settled account.

1. When an account has been once settled, and a balance struck, equity will not usually interfere, the remedy at law for the recovery of the balance being complete (*s*). The fact of such a settlement, therefore, usually affords a conclusive defence to an action for an account; and extensive lapse of time naturally adds to the weight of the defence.

What amounts to settlement.

In such cases it is often a matter of dispute whether a settlement has or has not in fact been concluded. A formal examination and signature of the account by the parties is the best evidence of such a settlement; but other circumstances may suffice to evidence a binding acceptance of the account (*t*). Where, for instance, an account has been delivered, and no objection is made within a reasonable time, the extent of which will of course depend upon the nature of the account, acquiescence in the settlement will be implied, and the account will be deemed a stated

(*p*) *Leigh* v. *Dickeson*, 15 Q.B. D. 60; 12 *ib.* 194; 54 L. J. Q. B. 18. And see *Farrington* v. *Forrester*, (1893) 2 Ch. 461; 62 L. J. Ch. 996; *Lawledge* v. *Tyndall*, (1896) 1 Ch. 923; 65 L. J. Ch. 654.
(*q*) P. 386 *et seq.*
(*r*) P. 141.
(*s*) *Dawson* v. *D.*, 1 Atk. 1.
(*t*) *Willis* v. *Jernegan*, 2 Atk. 251.

account (*t*). The mere delivery of an account will not, however, suffice to establish the fact of a settlement (*u*). The question is one which depends on the intention of the parties, and if the Court is satisfied as to this, a mere irregularity or informality in the mode of taking the account will not be a sufficient reason for re-opening it (*x*).

When accounts re-opened.

When in an action for an account the defence alleges a settlement, one of two courses may be open to the plaintiff. In some circumstances equity will not refuse to re-open the account, notwithstanding a settlement. The most potent of these is fraud. Thus if the parties to the settlement were not on equal terms, and it appears that one has been deceived, or has acted under duress, equity will grant relief (*y*). Such cases fall under the general principle of relief against fraud (*z*), which has already been considered. Similarly, on grounds of mistake or accident, equity will sometimes re-open an account; and this will always be done the more readily where there is a confidential relation between the parties, such as that of trustee and *cestui que trust*, or solicitor and client (*a*). The mere proof of a single error is not sufficient. The proper remedy in such a case is to give leave to surcharge and falsify (*b*). It is, generally speaking, necessary to show that injustice would be done by allowing the account to stand (*c*). Where compound interest was charged in a mortgage account by mistake, the account though settled was re-opened. It was considered, that though the giving of credit therefor in account might have been treated as so far equivalent to payment by mistake of law as to bar their recovery at law, in equity the line between mistakes of law and mis-

(*t*) *Willis* v. *Jernegan*, *sup.*

(*u*) *Irving* v. *Young*, 1 S. & S. 333.

(*x*) *Exp. Barber*, 5 Ch. 687; *Holgate* v. *Shutt*, 28 Ch. D. 111; 27 *ib.* 111; 54 L. J. Ch. 436.

(*y*) *Vernon* v. *Vawdry*, 2 Atk. 119; *Clarke* v. *Tipping*, 9 Beav. 284.

(*z*) *Holgate* v. *Shutt*, *sup.*

(*a*) *Matthews* v. *Wallwyn*, 4 Ves. 125; *Todd* v. *Wilson*, 9 Beav. 486; *Ward* v. *Sharpe*, W. N. (1884) p. 5; *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196; 66 L. J. Ch. 74.

(*b*) *Gething* v. *Keighley*, 9 Ch. D. 547; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218; 63 L. J. Ch. 239.

(*c*) *Lambert* v. *Still*, (1894) 1 Ch. 73; 63 L. J. Ch. 145.

takes of fact had not been so sharply drawn (*d*). When an account is thus wholly reopened, it is, of course, taken as at first, the burden of proof resting on each party to prove that which he claims to stand to his credit.

Liberty to surcharge and falsify.

But in other cases, though there may not be sufficient grounds to induce the Court wholly to reopen the account, it may grant leave to the plaintiff to surcharge and falsify, the effect of which is to throw on him alone the burden of proving any omission or error. If he can establish the omission of some item in his favour, or the insufficiency in form, of the account (*e*), he will be allowed to surcharge; if an error, the falsification will be rectified; but the *onus probandi* is wholly on him, the account, as a whole, being deemed *primâ facie* correct (*f*). Questions of law, as well as of fact, may be raised upon leave to surcharge and falsify (*g*).

Statute of Limitations.

2. Unless excluded by the existence of an express trust, the Statute of Limitations applies to an action for an account in equity as well as at law. The defence of the statute is available by an agent against his principal (*h*). Equity sometimes refuses to interfere with accounts on the ground of *laches*, though not extending to the statutory period. The maxim, "*Vigilantibus non dormientibus æquitas subvenit*," is peculiarly applicable to such cases as those in question, the proofs in which are so liable to destruction by lapse of time (*i*).

Laches.

(*d*) *Daniell* v. *Sinclair*, 6 App. C. 181; 50 L. J. P. C. 50.
(*e*) *Noyes* v. *Pollock*, 30 Ch. D. 336; 55 L. J. Ch. 54.
(*f*) *Pitt* v. *Cholmondeley*, 2 Ves. sr. 565.
(*g*) *Roberts* v. *Kuffin*, 2 Atk. 112.
(*h*) See *Lake* v. *Bell*, 34 Ch. D. 462; 56 L. J. Ch. 307; *Doody* v. *Watson*, 39 Ch. D. 178; 57 L. J. Ch. 865; *Friend* v. *Young*, (1897) 2 Ch. 421; 66 L. J. Ch. 737.
(*i*) *Banner* v. *Berridge*, 18 Ch. D. 254; 50 L. J. Ch. 630.

CHAPTER II.

THE ADMINISTRATION OF ASSETS.

SECTION I.—ADMINISTRATION GENERALLY.

I. *What is meant by Assets.*

Assets defined.

1. UNDER the ancient common law the debts of a deceased person were always payable out of his personal estate. The personal estate vested in the legal personal representative as soon as constituted, and to him the creditor must resort for satisfaction. But the personal representative, whether executor or administrator, was only chargeable to the extent of the personal estate of the debtor in his hands. This was termed "assets." The completeness of the creditor's remedy depended upon whether it was "*assez*," or sufficient to meet all the debts.

Real assets.

2. It was for a long time quite dependent upon a person's option whether or not his real property should be available for the payment of debts, in case the personalty should

prove insufficient. He might bind his heirs by deed or specialty to the payment of any debt or the fulfilment of any contract, to the value of the lands descending. In this case the position of the heir with respect to such specialty debts was similar to that of the executor or administrator with respect to debts generally; and the lands so descended were then termed real assets, or assets by descent. But the heir was not at all bound unless he was named in the deed or covenant, and, since he was only liable in any case to the extent of lands descending, the expectation of the specialty creditor, even when the heir was named, was wholly defeated if the testator devised his real estate away from his heir. There was no law to charge the devisee, and the heir took nothing to be charged.

Statutory real assets; 3 & 4 Will. & M. c. 14.

3. At length a statute was passed commonly known as the Statute of Fraudulent Devises (*a*), which made void all devises by will as against creditors by specialty in which the heirs were bound. Still, creditors who had not fortified themselves by securing a bond or covenant under seal were at the mercy of their debtor so far as concerned his real estate. The next step in their favour was taken in 1807, when, by 47 Geo. III. c. 74, the fee simple estates of deceased *traders* were rendered liable to simple contract as well as to specialty debts. In 1833 this remedy of creditors ceased to be confined to the case of traders, it being enacted by 3 & 4 Will. IV. c. 104, that all fee simple estates not charged with or devised subject to the payment of debts should be liable to be administered in the Court of Chancery for the payment of all the just debts of the deceased owner, whether by simple contract or specialty. By these steps fee simple estates at length became assets for the payment of all debts. And now by the Land Transfer Act, 1897 (*b*), the real estate of a deceased person, notwithstanding any testamentary disposition, vests on his

47 Geo. III. c. 74.

3 & 4 Will. IV. c. 104.

(*a*) 3 & 4 Will. & M. c. 14. (*b*) 60 & 61 Vict. c. 65, s. 1.

death in his personal representatives, and in the administration of his assets is subject to the same liabilities as personal estate.

Equitable assets.

4. But meanwhile the honesty of testators had devised a means by which creditors might obtain a satisfaction out of their real estate which the law did not afford them. It became a common thing for testators to expressly devise their lands to trustees upon trust for sale for the payment of their debts; or, what was, so far as concerned creditors, the same in effect, to charge their lands in the hands of the devisees with the payment of their debts. It is evident that the lands thus expressly made available for creditors were in a very different position from lands descending, or made legally liable to debts by statute. In the case of lands devised on trust for sale for or charged with payment of debts, the legal personal representative had nothing at all to do with them. The funds in his hands were the same as before, and to avail themselves of the testator's directions in their favour the creditors could not sue the executor or administrator, but were required to proceed in Chancery for the performance of the trust created in their favour. The lands thus brought within their reach were termed *equitable assets*.

How distinguished from legal assets.

It will be observed that the distinction between legal and equitable assets did not at all relate to the nature of the title to the property itself. Thus an equity of redemption of a leasehold was of course an equitable interest; but it none the less, on the death of the owner, became legal assets, because it devolved upon the personal representative. The real test was whether or not the property came to the executor *virtute officii*. If it did, it formed legal assets; if it did not, but the creditor had to resort to the Court of Chancery to secure the benefit of it, it was equitable assets. The distinction thus referred to *the remedy of the creditor, not to the nature of the property* (*c*).

(*c*) *Cook* v. *Gregson*, 3 Drew. 549.

Species of equitable assets.

Nor were lands thus devised on trust for sale or charged with debts the only species of equitable assets. The same principle which distinguishes them from legal assets includes also the equitable separate estate, whether real or personal, of married women, this being a creature of equity, and its liability to debts being recognised only in equity (*d*); and it was held that separate estate arising under the Married Women's Property Act, 1870, was subject to the same rules (*e*). But by virtue of s. 23 of the Married Women's Property Act of 1882 (*f*), the separate property of a married woman under the Act now vests in her legal personal representative *virtute officii*, and therefore must, it is submitted, be regarded as legal assets. A third species of equitable assets is property over which a testator has exercised a general power of appointment, which again does not come to the hands of the executor *virtute officii* (*g*).

Characteristics of equitable assets.

Until recently the distinction between legal and equitable assets was of great importance. In the administration or distribution of legal assets, a certain definite order of priority was observed between different species of debts. This order we shall presently consider in greater detail; at present it suffices, by way of illustration, to state that creditors by specialty were entitled to be paid in full before any payments were made to those whose claims arose from simple contracts. And when all debts were made recoverable out of real estates by the statute of 1833, this order of priority was not interfered with. The Court of Chancery, however, has always observed as a maxim that "*Equality is equity.*" In its distribution of equitable assets, therefore, it disregarded the legal rules as to priority, and treated all creditors, whatever the nature of their claims, *pari passu*. Moreover, it went farther than this in its favour of equality. Where there was a mixed

(*d*) *Owens* v. *Dickenson*, Cr. & Ph. 48.
(*e*) *Thompson* v. *Bennett*, 6 Ch. D. 739.
(*f*) 45 & 46 Vict. c. 75.
(*g*) *Pardo* v. *Bingham*, 6 Eq. 485.

fund of legal and equitable assets, and the specialty creditors, availing themselves of their priority with respect to the former, exhausted them, so as to leave nothing for the simple contract creditors, equity would not suffer any specialty creditor to receive any part of the equitable assets until the simple contract creditors were paid up to an equality with what the specialty creditors received from the legal assets (*h*).

It has been observed that the creation of equitable assets was not interfered with by 3 & 4 Will. IV. c. 104, lands devised charged with debts or on trust for their payment being excepted from its operation. The same exception had been made in 3 & 4 Will. & M. c. 14. One consequence, therefore, of the equitable method of distribution of equitable assets, was that a testator who had at law given a creditor the security of a bond, or other specialty binding his heirs, might defeat the legal priority thus bestowed by devising his realty charged with debts, and by this means placing its distribution in the hands of Chancery.

5. The importance of the distinction between legal and equitable assets was, however, to a great extent destroyed by the following statutes. First, by 32 & 33 Vict. c. 46 (commonly known as Hinde Palmer's Act), it was enacted that, "In the administration of the estate of every person "who shall die on or after the 1st day of January, 1870, "no debt or liability of such person shall be entitled to "any priority or preference by reason merely that the "same is secured by or arises under a bond, deed, or other "instrument under seal, or is otherwise made or constituted "a specialty debt; but all the creditors of such person, as "well specialty as simple contract, shall be treated as "standing in equal degree, and be paid accordingly out of "the assets of such deceased person, whether such assets "are legal or personal, any statute or other law to the

32 & 33 Vict. c. 46.

(*h*) *Plunket* v. *Penson*, 2 Atk. 290; *Bain* v. *Sadler*, 12 Eq. 570.

" contrary notwithstanding; provided also, that this Act " shall not prejudice or affect any lien or charge, or other " security which any creditor may hold or be entitled to " for the payment of his debt."

Judicature Act, 1875, s. 10.

6. Again, by s. 10 of the Judicature Act, 1875 (*i*), it was enacted that, " In the administration by the Court of " the assets of any person who may die after the com- " mencement of this Act, and whose estate may prove to " be insufficient for the payment in full of his debts and " liabilities . . . . the same rules shall prevail and be " observed as to the respective rights of secured and un- " secured creditors, and as to debts and liabilities prove- " able, and as to the valuation of annuities and future and " contingent liabilities respectively, as may be in force for " the time being under the law of bankruptcy with respect " to the estates of persons adjudged bankrupt."

The former of these statutes came into operation on the 1st January, 1870, the latter on the 1st November, 1875 (*k*). As to persons who died before the end of 1869, the old rules as to priority in administration therefore remain applicable; and as to persons who died between that date and the 1st of November, 1875, the old rules apply, except that specialty and simple contract creditors stand on the same footing. As cases may still occur to which neither of the statutes apply, the old law cannot yet be treated as entirely obsolete; and it is accordingly necessary in considering the details of administration to distinguish between the three periods indicated.

(*i*) 38 & 39 Vict. c. 77. (*k*) *Sherwin* v. *Selkirk*, 12 Ch. D. 68.

II. *Priority of Debts.*

1. *Before* 32 & 33 *Vict. c.* 46.

The following is the order in which the executor was and is required to pay out of legal assets the debts owing by testators who died previous to the 1st of January, 1870:

Debts to Crown by record or specialty.

(1.) Debts due to the Crown by record or specialty. Debts not of record or specialty have not absolute priority, but they nevertheless have priority over debts of equal degree due to subjects (*l*).

Statutory priority.

(2.) Debts to which particular statutes give priority— for instance, poor rates, by virtue of 17 Geo. II. c. 38; regimental debts, by virtue of 26 & 27 Vict. c. 57; certain liabilities to building societies (*m*), and to friendly societies (*n*).

Registered judgments,

(3.) Judgment debts duly registered. Final decrees, and orders of Courts of equity ordering money to be paid to a person, have the same effect as judgments at law (*o*).

and judgments against executor.

Pari passu with such judgments and decrees rank judgments recovered against the personal representative himself, even though unregistered (*p*). An order under Ord. XIV., r. 1, giving liberty to sign judgment does not give priority (*q*).

Registration was required of judgments against the deceased debtor, for the protection of the personal representative, who would otherwise be subject to unavoidable loss by exhausting the assets in paying debts of inferior degree, and then finding himself liable to a judgment debt of which he had no knowledge. Of course, in the case of a judgment against himself, no such reason applied to deprive the creditor of the reward of his superior diligence.

(*l*) *Re Henley & Co.*, 9 Ch. D. 481; *Re West London Commercial Bank*, 38 Ch. D. 364; 57 L. J. Ch. 925; *Att.-Gen.* v. *Leonard*, 38 Ch. D. 622; 57 L. J. Ch. 860.

(*m*) 4 & 5 Will. IV. c. 40, s. 12.

(*n*) 38 & 39 Vict. c. 60, s. 15; *Re Miller*, (1893) 1 Q. B. 32; 62 L. J. Q. B. 324.

(*o*) 1 & 2 Vict. c. 110, s. 18; *Wilson* v. *Dunsany*, 18 Beav. 299.

(*p*) *Williams* v. *W.*, 15 Eq. 270.

(*q*) *Clifford* v. *Gurney*, (1896) 2 Ch. 863; 66 L. J. Ch. 32.

Statutes and recognizances.

(4.) Debts of record other than judgments—*e.g.*, statutes and recognizances. Statutes have long been obsolete. Recognizances are, however, continually employed—for instance, they are required from persons appointed by the Court of Chancery as receivers, and a debt from a receiver for this reason ranks as a debt of record (*r*).

Specialty debts.

(5.) Debts by specialty contracts for valuable consideration, whether the heir is or is not bound (*s*). A mere recital of a debt in a deed does not constitute it a specialty debt. It is necessary that it should be created, or at least novated, by the deed (*t*).

Arrears of rent service rank equally with debts by specialty, even though the rent be reserved by parol. The liability of a contributory in the winding-up of a company under the Companies Act, 1862, is also of the nature of a specialty debt (*u*). A voluntary bond assigned for value in the lifetime of the obligor was held to rank as a specialty (*x*).

Unregistered judgments against deceased, and simple contract debts.

(6.) Unregistered judgments against the deceased debtor (*y*), and debts by simple contract. These comprise debts due on negotiable instruments, and also liabilities in respect of breaches of trust not being breaches of covenant under seal (*z*).

Voluntary bonds and covenants.

(7.) Voluntary bonds or covenants in the hands of a volunteer. These, though postponed to all contract debts, were considered by virtue of their antecedent legal title to have priority over legatees (*a*). The holder of a voluntary bond may, moreover, sustain a creditor's suit for administration, and his claim is preferred to a claim for interest upon debts which do not carry interest at law (*b*).

(*r*) *Seagram* v. *Tuck*, 18 Ch. D. 296; 50 L. J. Ch. 572.

(*s*) *Cunliffe-Smith* v. *Hankey*, (1899) 1 Ch. 541; 68 L. J. Ch. 242.

(*t*) *Iven* v. *Elwes*, 3 Drew. 25.

(*u*) 25 & 26 Vict. c. 89, ss. 75, 76; *Buck* v. *Robson*, 10 Eq. 629.

(*x*) *Payne* v. *Mortimer*, 4 De G. & J. 447, 452.

(*y*) *Van Gheluive* v. *Nerinckx*, 21 Ch. D. 189; 51 L. J. Ch. 929.

(*z*) *Adey* v. *Arnold*, 2 De G. M. & G. 432.

(*a*) *Fletcher* v. *F.*, 4 Ha. 74.

(*b*) *Garrard* v. *Dinorben*, 5 Ha. 213.

Such is the order of payment so far as unaffected by legislation. Before considering the effects of the statutes which have modified it, it may be well to mention certain liabilities and powers of executors which have special reference to the rules as to priority.

2. *Rights and liabilities of executors, &c.*

Executor's liability to creditors.

(1.) An executor who, having notice of a superior debt, voluntarily pays one of inferior order, thereby renders himself personally liable, in case of a deficiency of assets, to pay the former debt. He was at one time presumed to have notice of judgments and decrees in equity against the deceased. But from the hardship which thus threatened him he was relieved by various statutes, which rendered such judgments of no effect against him unless docketed or registered (*c*). As regards other debts, he was not liable, except in case of actual notice (*d*).

Power of preference.

(2.) Among creditors *of equal degree* an executor may at any time before decree in an administration action pay one in preference to another (*e*), unless meanwhile a receiver has been appointed or an injunction obtained (*f*).

Retainer.

(3.) An executor or administrator, to whom a debt, whether legal or equitable, was owing by the deceased person, has a right to retain his debt out of the legal assets in priority to other creditors of equal degree (*g*); and he may, where his debt exceeds the testator's assets, retain the assets in *specie* without conversion (*h*). He cannot, however, retain as against any debt of superior degree, of which he has notice, such as a specialty debt, notwith-

(*c*) 4 & 5 Will. & M. c. 20; 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 23 & 24 Vict. c. 38.

(*d*) *Brooking* v. *Jennings*, 1 Mod. 175.

(*e*) *Lyttleton* v. *Cross*, 3 B. & C. 317, 322; Williams' Executors, p. 1036, ed. 8.

(*f*) *Re Radcliffe*, 7 Ch. D. 733; *Vibart* v. *Coles*, 24 Q. B. D. 364; 59 L. J. Q. B. 152.

(*g*) *Cockcroft* v. *Black*, 2 P. Wms. 298; *Laver* v. *Botham*, (1895) 1 Q. B. 59; 64 L. J. Q. B. 110; *Adcock* v. *Evans*, (1896) 2 Ch. 345; 65 L. J. Ch. 760.

(*h*) *Re Gilbert*, (1898) 1 Q. B. 282; 67 L. J. Q. B. 229.

standing that specialty debts now, for general administration purposes, rank with simple contracts (*i*). The retainer will not be interfered with if the executor had no notice of the superior debt (*k*). He can only retain out of such assets as come to his own hands; thus, though a decree in an administration action is no hindrance to the right (*l*), if a receiver is appointed there is no retainer out of funds received by him (*m*). But a receiver will not be appointed merely for the purpose of defeating the retainer (*n*). The present form of the administration bond, though requiring the administrator to distribute the estate without "unduly preferring his own debt," does not affect the right of retainer (*o*). A statute-barred debt may be retained (*p*), but not a debt the right to which, as well as the remedy, is barred by a non-compliance with the Statute of Frauds (*q*). An executor of an executor or administrator who has asserted the right in his lifetime, may similarly retain for a debt due to the executor or administrator (*r*). And a husband who is executor may retain for a debt due to his wife, or, if his wife was executrix, may retain for a debt due to himself or his wife (*s*). A widow who is executrix may retain a debt due to her from her husband's estate in respect of a loan made to him for the purposes of his business (*t*).

(*i*) *Wilson* v. *Coxwell*, 23 Ch. D. 764; 52 L. J. Ch. 975; *Calver* v. *Laxton*, 31 Ch. D. 440; 55 L. J. Ch. 350.

(*k*) *Blake* v. *Gale*, 32 Ch. D. 571; 55 L. J. Ch. 559; *Wingfield* v. *Erskine*, (1898) 2 Ch. 562; 67 L. J. Ch. 620.

(*l*) *Campbell* v. *C.*, 16 Ch. D. 198; *Jones* v. *Pennefather*, (1896) 1 Ch. 956; 65 L. J. Ch. 419; *Whitaker* v. *Barrett*, 43 Ch. D. 70; 59 L. J. Ch. 218.

(*m*) *Calver* v. *Laxton*, *sup.*; *Latimer* v. *Harrison*, 32 Ch. D. 395; 55 L. J. Ch. 687; *Vibart* v. *Coles*, 24 Q. B. D. 364; *Pulman* v. *Meadows*, (1901) 1 Ch. 233; 70 L. J. Ch. 97.

(*n*) *Molony* v. *Brooke*, 45 Ch. D. 569.

(*o*) *Davies* v. *Parry*, (1899) 1 Ch. 602; 68 L. J. Ch. 346; *Richardes* v. *Yates*, (1901) 2 Ch. 52; 70 L. J. Ch. 474.

(*p*) *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415. See *Trevor* v. *Hutchins*, (1896) 1 Ch. 844; 65 L. J. Ch. 738.

(*q*) *Field* v. *White*, 29 Ch. D. 358; 54 L. J. Ch. 950.

(*r*) *Hopton* v. *Dryden*, Prec. Ch. 180; *Weeks* v. *Gore*, 3 P. Wms. 184, n.; *Norton* v. *Compton*, 30 Ch. D. 15; 54 L. J. Ch. 904.

(*s*) *Atkinson* v. *Rawson*, 1 Mod. 208. See *Re MeMyn*, 33 Ch. D. 575; 55 L. J. Ch. 845.

(*t*) *Crawford* v. *May*, 45 Ch. D. 499.

No such rights of retainer exist with respect to equitable assets; but though the Judicature Act has, as far as regards the order of distribution, in some respects put equitable and legal assets upon the same footing, it has been held that it does not interfere with the well-established right of retainer out of legal assets (*u*). The retainer cannot be asserted when an estate is being administered in bankruptcy (*x*), but an order under s. 125 of the Bankruptcy Act, 1883, for the administration of an insolvent testator's estate in bankruptcy, only vests in the official receiver so much of the estate as is properly distributable amongst the creditors, and it does not deprive the executor of his right of retainer out of assets which he has already got in, and even though by mistake he has paid over the assets to the official receiver he is entitled to be repaid (*y*).

When executor not liable.

There are two ways in which a legal personal representative may secure himself from his primary liability for the debts of the deceased. First, by throwing the administration into the hands of the Court. As long as the estate is being administered, the creditor's remedy is of course to prove his debt therein. When the administration is complete, his only resource is to follow the assets into the hands of the residuary legatee or next of kin (*z*). Secondly, the legal personal representative may obtain a statutory protection under 22 & 23 Vict. c. 35, s. 29, by issuing regular notices, and distributing the estate in accordance therewith (*a*). If, however, he administers out of Court on his own responsibility, he remains *primâ facie* liable to the claim of any unpaid creditor, though if required to pay a debt of which at the time of distribution he had no notice,

(*u*) *Lee* v. *Nuttall*, 12 Ch. D. 61; *Richmond* v. *White*, *ib.* 361.

(*x*) *Atkinson* v. *Powell*, 36 Ch. D. 233; 56 L. J. Ch. 552.

(*y*) *Re Rhoades*, (1899) 2 Q. B. 347; 68 L. J. Q. B. 804; *Hasluck* v. *Clark*, (1898) 2 Q. B. 28; (1899) 1 Q. B. 699; 68 L. J. Q. B. 486.

(*z*) *Thomas* v. *Griffiths*, 2 Giff. 504; 2 De G. F. & J. 555; *Doughty* v. *Townson*, 43 Ch. D. 1; 59 L. J. Ch. 18.

(*a*) *Clegg* v. *Rowland*, 3 Eq. 368.

he would be entitled to call upon the residuary legatee or next of kin to refund (*b*). *Secus*, if he had notice of the debt (*c*). Moreover, in the absence of wilful default, which is not easily established (*d*), the executor's liability is limited to the assets which come to his hands actually or constructively (*e*).

3. *Priority of debts under* 32 & 33 *Vict. c.* 46.

Effect of 32 & 33 Vict. c. 46.

We have seen that this Act places specialty debts on the same level and footing as debts by simple contract. And it includes in its operation those other debts which we have mentioned as previously ranking with specialty debts—viz., debts due from contributories in the winding-up of companies and arrears of rent (*f*).

With this exception, however, the order remains as before. Debts to the Crown (*g*), judgments, and other debts of record retain their former position. And this being so, a creditor in an administration under this Act who secures a judgment against an executor for a simple contract debt, thereby actually gains priority over a creditor by special contract (*h*). The executor's right of retainer was not affected by this Act (*i*).

An heir or devisee of real estate has no right of retainer out of descended or devised lands for a debt due to him in respect of simple contract debts. Specialty debts, it appears, may be retained thereout (*k*).

(*b*) *Jervis* v. *Wolferstan*, 18 Eq. 18.

(*c*) *Whittaker* v. *Kershaw*, 45 Ch. D. 320.

(*d*) *Cooke* v. *Stevens*, (1897) 1 Ch. 422; (1898) 1 Ch. 162; 67 L. J. Ch. 118.

(*e*) *Akerman* v. *A.*, (1891) 3 Ch. 212; 61 L. J. Ch. 34; *Taylor* v. *Wade*, (1894) 1 Ch. 671; 63 L. J. Ch. 424.

(*f*) *Shirreff* v. *Hastings*, 6 Ch. D. 610.

(*g*) *Bentinck* v. *B.*, (1897) 1 Ch. 673; 66 L. J. Ch. 359.

(*h*) *Hanson* v. *Stubbs*, 8 Ch. D. 154.

(*i*) *Crowder* v. *Stewart*, 16 Ch. D. 368; 50 L. J. Ch. 136.

(*k*) *Re Illidge*, 27 Ch. D. 478; 53 L. J. Ch. 991; *Ferguson* v. *Gibson*, 14 Eq. 379.

4. *Priority under the Judicature Act*, 1875 (*l*).

Effect of Judicature Act, s. 10.

The above quoted section of this Act (*m*) has in some respects completely changed the method of administration as regards the debts of persons dying since the 1st of November, 1875; but nevertheless the effect of this enactment does not appear to be so extensive as at first sight one might suppose.

Applies to insolvent estates only.

In the first place, its application is confined to cases of the administration by the Court of *insolvent* estates. And again, where no recourse is had to the Court for the administration of insolvent estates, the priorities of creditors are determined by the old law.

How far rules of bankruptcy applied.

Further, the law of bankruptcy is by this section, even when it operates, only to be applied in three respects: (1) As to respective rights of secured and unsecured creditors; (2) As to the debts and liabilities proveable; (3) As to the valuation of annuities and future and contingent liabilities. It is only the first of these heads which can affect the rules as to priorities now under view. The question is, to what extent it modifies the previous law.

Secured debts.

In one respect the change introduced is obvious. In equity a mortgagee has always been allowed to pursue all his remedies concurrently; his enforcement of one does not prejudice him in the prosecution of another; he may at the same time sue personally for his debt, and proceed to enforce his specific security by foreclosure or sale. It was held in an important case (*n*) that the death of the mortgagor made no difference to this right, and that thus in the administration of his estate the mortgagee might share rateably with other creditors by proving for the full amount of his debt against the estate; and having received his dividend, might proceed to realise his security, and retain thereout the whole balance due to him. He might

Mason v. *Bogg*.

(*l*) 38 & 39 Vict. c. 77.
(*m*) *Sup.*, p. 560.
(*n*) *Mason* v. *Bogg*, 2 My. & Cr. 443.

thus receive twenty shillings in the pound, while the unsecured creditors had to be satisfied with a small dividend.

Rule in bankruptcy.

Under the Bankruptcy Acts, the position of a mortgagee or other secured creditor is, however, much less advantageous. By s. 39 and the second schedule of the Act of 1883 (*o*), which follows in this respect the previous Act, he is required to elect whether he will prove for his whole debt, and at the same time give up his security for the benefit of the estate; or whether he will retain his security, and after valuation, or sale of it, prove only for the balance of his debt. The effect of his security is thus not prejudiced, but as regards the balance of his debt he is in no better position than any other creditor; and if not fully secured, he cannot receive twenty shillings in the pound unless the unsecured creditors do so also.

Judicature Act.

The effect of the Judicature Act, then, is clearly to substitute this rule for the rule established by *Mason* v. *Bogg* (*p*) in the administration by the Court of insolvent estates. Certain priorities among debts are definitely laid down in the Bankruptcy Act. By ss. 40-2 (modified now by 51 & 52 Vict. c. 62, and as to the winding-up of companies by 60 & 61 Vict. c. 19) (*q*) certain rates and taxes and certain wages and salaries are to be paid before general debts, and with these exceptions all debts proveable under the bankruptcy are to be paid *pari passu*. Now these preferential debts are quite different from those to which priority was given in administration. The difference is two-fold; on the one hand, bankruptcy gives no priority to judgments registered or unregistered, or to recognizances, over simple contract debts; on the other hand, in administration no preference was shown for wages and salaries; and these differences remain unaffected. In *Lee* v. *Nuttall* (*r*), James, L.J., said: "The *sole* object of "the 10th section, as it appears to me, was to get rid

(*o*) 46 & 47 Vict. c. 52.

(*p*) 2 My. & Cr. 443.

(*q*) *Parkington* v. *Haywood*, (1897) 2 Ch. 593; 67 L. J. Ch. 25; *Re Waverley Typewriter*, (1898) 1 Ch. 699; 67 L. J. Ch. 360.

(*r*) 12 Ch. D. 61.

" of the rule in Chancery under which a secured creditor " could prove for the full amount of his debt and realise " his security afterwards, and to put him on the same " footing as in bankruptcy " (*s*). It has further been decided that in the winding-up of companies to which the same words in the same section apply, the preferences recognized in bankruptcy do not operate (*t*). It has also been recently held that although s. 10 of the Judicature Act does not generally affect the priorities of debts in administration, it so far introduces the principles of bankruptcy as to admit of voluntary creditors being paid *pari passu* with creditors for value (*u*).

III. *Order of Administration.*

Such being the order of priority *inter se* of the creditors of a deceased person, the next inquiry is as to the order in which the assets will be applied in the discharge of the liabilities. This inquiry in effect ascertains the respective priorities of the various classes of persons who claim to take the deceased's estate beneficially.

Rights of creditors not affected by order.

It will, of course, be remembered in considering this question, that the points now to be raised do not in any way interfere with a creditor's rights. His remedies extend to the whole of the assets, and are not prejudiced by any claims which the different classes of legatees, devisees, &c., may have *inter se*. Under the head of Marshalling we shall see how those claims are adjusted if the creditor, in pursuance of his rights, resorts to the assets in an order

(*s*) *Ibid.*; *Richmond* v. *White*, 12 Ch. D. 361.

(*t*) *Re Albion, &c. Co.*, 7 Ch. D. 547; *Re Withernsea Brickworks*, 16 Ch. D. 337; 50 L. J. Ch. 185; *Pratt* v. *Inman*, 43 Ch. D. 175; 59 L. J. Ch. 274.

(*u*) *Whitaker* v. *Palmer*, (1900) 2 Ch. 676; (1901) 1 Ch. 9; 70 L. J. Ch. 6; *Re Leng, Tarn* v. *Emmerson*, (1895) 1 Ch. 652; 64 L. J. Ch. 468, disapproving *Re Maggi*, 20 Ch. D. 545; 51 L. J. Ch. 560; *Smith* v. *Morgan*, 5 C. P. D. 337.

contrary to that which the law prescribes as between the beneficiaries.

General personalty first liable. *Ancaster* v. *Mayer*.

1. It was well established in the case of *Ancaster* v. *Mayer* (*v*), and has ever since been the rule, that in the administration of the estates of deceased persons, the general personal estate is the primary fund for the payment of their debts. In order to avoid this primary liability, it is necessary that the personal estate should be exempted, either by express words or by the indication of a manifest intention to the contrary.

Exemption: express, implied.

Exemption by express words is so plain a matter as to need no exposition or illustration. But the question as to what amounts to a manifest indication of intention to exempt the personalty is one which has caused such difficulty to judges as to have elicited frequent expressions of the wish that nothing but express words had been permitted to alter the course and order of law.

Onus of proof.

It must be always remembered that the burden of proof lies on those who claim to have the personalty exonerated (*x*). Bearing this in mind, we shall first state what is not considered a sufficiently manifest indication of this intention; and, secondly, shall examine some cases in which the personalty was held to have been exonerated.

What does not exempt personalty. Charge of debts, &c.

(1.) Neither a charge of the debts upon the land, nor a direction to sell it for the payment of debts, nor the creation of a term for that purpose, nor even a devise upon the condition of the devisee's paying the testator's debts, will exempt the personalty from its primary liability (*y*). And the same rule was applied where the charge of the real estate was contained in a deed, and the testator by will recited the deed and disposed only of the residue of his property not comprised therein (*z*). It is necessary not

(*v*) 1 Bro. C. C. 454; 1 W. & T. L. C. 681.
(*x*) *Whieldon* v. *Spode*, 15 Beav. 539.
(*y*) *Tower* v. *Rous*, 18 Ves. 132, 138; *White* v. *W.*, 2 Vern. 43; *Inchiquin* v. *French*, 1 Cox, 1; *Bridgman* v. *Dove*, 3 Atk. 201.
(*z*) *Trott* v. *Buchanan*, 28 Ch. D. 446; 54 L. J. Ch. 678.

only that the realty should be charged, but that the testator should indicate a purpose that the personalty should not be applied (*a*). Again, the mere charge of funeral or testamentary expenses, or both together with the debts upon the real estate, will not of itself exempt the personalty (*b*), though it may afford a strong argument in that direction (*c*).

Express charge of some debt on personalty.

An express charge on the personalty of some particular debts, such as simple contract debts or legacies, for the payment of which it would without such charge be primarily liable, will not, by the application of the maxim, *Expressio unius est exclusio alterius*, raise a sufficient presumption that it was intended to be only an auxiliary fund for the payment of other liabilities not expressly charged upon it, but charged upon the land (*d*).

Bequest of personalty.

A bequest of all the personal estate, with or without specific description, will not, at least where the legatee is also appointed executor, be so distinguished from a general residuary bequest as to exonerate the personalty passing under such bequest, although lands are devised in trust to pay all the testator's debts (*e*). It has also been so decided where the legatee was not executor (*f*). Such a case is stronger, however, in favour of exoneration than the former, and has, when coupled with a charge of debts and funeral and testamentary expenses upon the realty, been often considered sufficient to constitute the real estate a primary fund for their payment (*g*). It is still stronger in favour of exoneration, if with such a bequest a particular real

(*a*) *Quennell* v. *Turner*, 13 Beav. 240; *Samwell* v. *Wake*, 1 Bro. C. C. 145.

(*b*) *Brydges* v. *Phillips*, 6 Ves. 570; *Bootle* v. *Blundell*, 1 Mer. 229.

(*c*) *Tower* v. *Rous*, 18 Ves. 132, 139.

(*d*) *Watson* v. *Brickwood*, 9 Ves. 447.

(*e*) *Harewood* v. *Child*, stated Ca. t. Talb. 204; *Haslewood* v. *Pope*, 3 P. Wms. 324.

(*f*) *Collis* v. *Robins*, 1 De G. & Sm. 131; *Ouseley* v. *Anstruther*, 10 Beav. 453.

(*g*) *Greene* v. *G.*, 4 Madd. 148; *Driver* v. *Ferrand*, 1 R. & M. 681; *Gilbertson* v. *G.*, 34 Beav. 354; *Kilford* v. *Blaney*, 31 Ch. D. 56; 55 L. J. Ch. 185.

estate has been devised upon trust for payment of debts and funeral and testamentary expenses (*h*).

Parol evidence not admissible.

Parol evidence is not admissible to show the intention of a testator to give his personal estate free from debts, nor will any inference be drawn concerning the testator's intention from a consideration of the relative amount of his personal estate and debts; and consequently no inquiry will be directed to ascertain such relative amount (*i*).

Cases of exemption.

(2.) The primary liability of the general personal estate will be displaced by the appropriation of a specific part of the personal estate to the payment of debts, coupled with a bequest of the general residue. But if there is no such residuary bequest the residue will still remain primarily liable, notwithstanding the appropriation of the specific fund (*k*). On the same principle, it must be observed that even an express exemption of the personalty will not extend to the benefit of the next of kin claiming by a lapse (*l*).

Where a testator devised his real estate to be sold, and directed the money to arise by the sale to be applied to pay mortgages and all other debts, the residue to be added to the personal estate, this was held to make the real estate the primary fund (*m*).

General conclusion.

We are led, then, to the conclusion that the first fund to be resorted to for the payment of debts is the general personal estate; and that its primary liability will only be disturbed by an express declaration of such intention, or by dispositions which very nearly imply it. In the case of a mortgage debt there are other considerations involved, with a series of statutory modifications, which it is convenient to postpone for separate treatment.

Lands devised on trust for debts.

2. After the general personalty, the next fund resorted to for the payment of debts is land devised upon express

(*h*) *Powell* v. *Riley*, 12 Eq. 175.
(*i*) *Tait* v. *Northwick*, 4 Ves. 816; *Stephenson* v. *Heathcote*, 1 Ed. 38.
(*k*) *Bootle* v. *Blundell*, 1 Mer. 220.
(*l*) *Waring* v. *Ward*, 5 Ves. 675.
(*m*) *Webb* v. *Jones*, 2 Bro. C. C. 60; 1 Cox, 245. And see *Ashworth* v. *Munn*, 34 Ch. D. 391.

trust for their payment (*n*). As we have seen, such land is equitable assets, and, therefore, in all cases distributed amongst creditors *pari passu*.

Lands descended.

3. Next in order stand lands descended to the heir, and not charged with debts (*o*). Since 3 & 4 Will. IV. c. 106, if there is a specific devise of lands to the heir, he is considered to take them in the character of devisee, and not by descent. His position as regards these lands is therefore the same as that of any other specific devisee (*p*).

Devises and bequests charged.

4. Lands devised charged with the payment of debts are next liable (*q*); and being equitable assets, are distributed in payment of debts *pro rata*. Moreover, if a devise of lands so charged lapses, and the heir consequently takes, this does not alter their place in the order of administration. They still rank as lands charged, and not as lands descended (*r*). Personalty bequeathed subject to a charge of debts stands in the same degree.

Lands charged with debts being equitable assets, the Court, in its favour of an equal distribution amongst creditors, has been inclined to give as wide a construction as possible to any passage in a will which can be considered as amounting to a charge of debts (*s*).

What amounts to charge.

A mere declaration that the debts shall be paid by the executors will not, indeed, amount to a charge of debts on realty, which does not come to the hands of the executors at all. But if with such a direction real estate is devised to executors, then it is considered as charged in their hands, unless from the special circumstances of the case a contrary intention is apparent (*t*); and it is immaterial whether

(*n*) *Serle* v. *St. Eloy*, 2 P. Wms. 386; *Phillips* v. *Parry*, 22 Beav. 279.

(*o*) *Davies* v. *Topp*, 1 Bro. C. C. 524, 527.

(*p*) S. 6, *Biedermann* v. *Seymour*, 3 Beav. 368.

(*q*) *Donne* v. *Lewis*, 2 Bro. C. C. 259; *Barnewell* v. *Cawdor*, 3 Mad. 453; *Bate* v. *B.*, 43 Ch. D. 600; 59 L. J. Ch. 277.

(*r*) *Wood* v. *Ordish*, 3 Sm. & G. 125; *Stead* v. *Hardaker*, 15 Eq. 175.

(*s*) *Silk* v. *Prime*, 1 Bro. C. C. 139.

(*t*) *Warren* v. *Davies*, 2 My. & K. 49; *Bailey* v. *B.*, 12 Ch. D. 268.

the executor takes the whole beneficial interest, or only a life interest, or no beneficial interest at all (*u*). A mere authority to pay debts is not tantamount to a direction to pay (*x*). If, moreover, there is a direction in general terms that debts shall be paid, not specifying by whom, and accompanied by an expressed intention to dispose of the real estate, that effectually charges devised lands (*y*). The principle is that such a general direction indicates an intention that the debts shall at all events be paid in preference to any disposition of real or personal property (*z*).

The law, statutory and otherwise, respecting the sale and disposition of charged lands is discussed elsewhere (*a*).

General legacies.

5. General pecuniary legacies next abate *pro rata* as far as is necessary (*b*). Annuities are equivalent to legacies, and after valuation (since the Judicature Act on the principles of bankruptcy) abate *pro rata* with them (*c*). It must be observed also that if a general legacy be given for valuable consideration, such as the relinquishment of dower, or of a debt, it is entitled to priority over all merely voluntary legacies (*d*).

Specific legacies and devises.

6. Then specific legacies (*e*) and specifically devised real estate (*f*) not charged with debts are resorted to *pro rata*.

Residuary devise specific.

Under this head it is to be observed that a residuary devise is considered to be specific. While a residuary devise comprised only lands which the testator was possessed of at the date of his will, this could hardly be doubted. But

(*u*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, 476; 51 L. J. Ch. 434; *Finch* v. *Hattersley*, 3 Russ. 345, n.; *Hartland* v. *Murrell*, 27 Beav. 204; *Re De Burgh-Lawson*, 41 Ch. D. 568; 58 L. J. Ch. 561.

(*x*) *Re Head's Trustees and Macdonald*, 45 Ch. D. 310; 59 L. J. Ch. 604.

(*y*) *Shalleross* v. *Finden*, 3 Ves. 738.

(*z*) *Clifford* v. *Lewis*, 6 Madd. 38.

(*a*) See pp. 344 *et seq.*

(*b*) *Clifton* v. *Burt*, 1 P. Wms. 680; *Re Schweder*, (1891) 3 Ch. 44; 60 L. J. Ch. 656.

(*c*) *Ward* v. *Gray*, 26 Beav. 491; *Miller* v. *Huddlestone*, 3 Mac. & G. 513. See and distinguish *Allen* v. *Sinclair*, (1897) 1 Ch. 921; 66 L. J. Ch. 514.

(*d*) *Burridge* v. *Bradyl*, 1 P. Wms. 126; *Davies* v. *Bush*, 1 Yo. 341.

(*e*) *Fielding* v. *Preston*, 1 De G. & J. 438; *Re Butler*, (1894) 3 Ch. 250; 63 L. J. Ch. 662.

(*f*) *Mirehouse* v. *Scaife*, 2 My. & Cr. 695.

it was less clear when, by the Wills Act (*g*), a will was made, in the absence of a contrary intention being manifest, to speak as from the death, and thus to include in its operation after-acquired property. After considerable conflict of opinion, it was, however, decided in *Hensman* v. *Fryer* (*h*) that a residuary devise was still specific; and this is now well established (*i*). In *Hensman* v. *Fryer* it was, indeed, further held that a residuary devisee must contribute rateably with pecuniary legatees to the payment of debts. This portion of the decision could evidently only be made consistent with the previous proposition by considering pecuniary and specific legatees and specific devises as on the same footing. But this is opposed to a multitude of high authorities; and we accordingly find that the broad principle of *Hensman* v. *Fryer* has in more recent cases been applied without interference with the prior liability of pecuniary legatees, residuary and other specific devises and specific bequests being classed together next in order to pecuniary legacies (*k*).

The expressions which suffice to constitute a specific legacy are fully considered hereafter.

7. A widow's paraphernalia is liable (with the exception of her wearing apparel) to her husband's debts; and it would seem that this is its proper place in the order of administration (*l*). Her claim is doubtless superior to that of a pecuniary legatee (*m*), and upon principle she should be preferred to specific legatees or devisees, who are at the best but volunteers (*n*). At the same time there would be no reason for entitling her to rank higher than an appointee under a general power. Paraphernalia.

(*g*) 1 Vict. c. 26, s. 24.
(*h*) 3 Ch. 420.
(*i*) *Gibbins* v. *Eyden*, 7 Eq. 371; *Lancefield* v. *Iggulden*, 10 Ch. 136; *Ogden* v. *Mason*, (1901) 1 Ch. 619; 70 L. J. Ch. 343; *Re Maddock*, (1901) 2 Ch. 372; (1902) 2 Ch. 220.
(*k*) *Collins* v. *Lewis*, 8 Eq. 708; *Dugdale* v. *D.*, 14 Eq. 235; *Tomkins* v. *Colthurst*, 1 Ch. D. 626; *Farquharson* v. *Floyer*, 3 Ch. D. 109.
(*l*) *Tipping* v. *T.*, 1 P. Wms. 730.
(*m*) *Ibid.*; *Boynton* v. *Parkhurst*, 1 Bro. C. C. 576.
(*n*) *Tynt* v. *T.*, 2 P. Wms. 542.

Property appointed.

8. Lastly, real or personal property over which the testator has a general power of appointment, and over which he has actually exercised that power *by will* in favour of volunteers, is applicable (*o*); but it must be clear that the testator intended to treat the property as his own to all intents (*p*). As the creditors can only claim under the appointment, which is a voluntary act, they will have no claim unless the power is actually exercised, since equity will not interfere to aid the non-execution of a power in favour of volunteers (*q*). It must be observed, however, that a residuary gift will, under s. 27 of the Wills Act (*r*), operate as an appointment, unless a contrary intention appears. Property appointed is equitable assets, and accordingly distributable *pro rata* (*s*).

IV. *Payment of Mortgage Debts.*

It has been already remarked that these rules as to the order of the liability of assets for debts are in some degree varied when the question is respecting the payment of a mortgage debt; and for convenience sake this was reserved for separate consideration. The law on this head having been revolutionised by the statute known as *Locke King's Act* (*t*), the inquiry naturally resolves itself into two divisions—first, as to the law applicable to cases not within that Act; secondly, as to the effect of that Act and of others which have amended, or rather added to it.

(*o*) *Fleming* v. *Buchanan*, 3 De G. M. & G. 976; *Hawthorn* v. *Shedden*, 3 Sm. & G. 305; *Hinsley* v. *Inckeringill*, 17 Ch. D. 151; 50 L. J. Ch. 364.

(*p*) *Thurston* v. *Evans*, 32 Ch. D. 506; 55 L. J. Ch. 564. See as to what amounts to sufficient indication of intention, *Coxen* v. *Rowland*, (1894) 1 Ch. 406; 63 L. J. Ch. 179; *Kelly* v. *Boyd*, (1897) 2 Ch. 232; 66 L. J. Ch. 614; *Shaw* v. *Marten*, (1902) 1 Ch. 314.

(*q*) *Holms* v. *Coghill*, 12 Ves. 206.

(*r*) 1 Vict. c. 26.

(*s*) *Pardo* v. *Bingham*, 6 Eq. 485.

(*t*) 17 & 18 Vict. c. 113.

1. *Before* 17 & 18 *Vict. c.* 113.

Where an estate is incumbered with a mortgage, either the incumbrance must have been created by the deceased person, or the estate must have been already incumbered when it came to his hands. The question by whom the mortgage debt was incurred principally determined what fund was *primâ facie* liable to its payment. It will facilitate the inquiry to consider the two cases separately.

(1.) Where the mortgage was the debt of the deceased.

Personalty primarily liable.

In this case the general rule was the same with respect to mortgage debts as to others; the general personalty was first to be resorted to. Whether the mortgaged estate descended to the heir or was devised, the heir in the former case and the devisee in the latter might require the personal representative to discharge the mortgage, so that the estate might be enjoyed *sine onere*. This was the *primâ facie* presumption, and in order to avoid it, it was incumbent on the personal representative to show that there was an intention on the part of the testator that the mortgaged estate should bear its own burden (*u*).

Presumption, how rebutted.

Of course, in case of an intestacy, there were no means at all of rebutting this presumption. Where there was a will it required strong expressions to do so. The strongest case for exoneration was naturally that in which the intention was manifested by express words. This requires no comment. It sufficed also if an intention was clearly implied; but the decisions show that the implication had to be very clear. Thus a devise of the estate for payment of debts generally, or a general charge of debts thereon, did not suffice to exonerate the personalty (*x*). Even if the devise contained the words "subject to the mortgage or incumbrance thereon," these were considered as merely descriptive, and not as showing an intention to throw the debt primarily on the mortgaged estate (*y*). A devise of

(*u*) *Davies* v. *Bush*, 4 Bli. N. S. 305.

(*x*) *Hancox* v. *Abbey*, 11 Ves. 169, 186.

(*y*) *Serle* v. *St. Eloy*, 2 P. Wms. 386.

the mortgaged land, however, charged with or on trust for payment of the mortgage debt, was considered sufficient to rebut the *primâ facie* rule (*z*). The same was the case where there was a devise to a person of an estate, "he paying the mortgage thereon" (*a*). It will be observed how nearly these cases come to an express declaration of intention.

(2.) Where the mortgage was not the debt of the deceased.

Mortgaged estate primarily liable,

Where the mortgage was not in its inception the personal debt of the devisor or intestate, but had been incurred by his predecessor in title, the general rule was that the mortgaged estate should itself be primarily liable to the charge; and this whether he acquired the estate already charged, or the charge was effected for some other purpose than for his benefit—for instance, to secure a portion or jointure (*b*).

unless debt adopted by testator.

In order in such a case to reverse this rule, and throw the mortgage debt primarily on the personalty, it was incumbent on the heir or devisee to show that the devisor or ancestor had adopted the debt as his own (*c*). If he had, the ordinary rule applied. It was therefore a matter of great importance, and it was often a matter of great difficulty, to ascertain whether there had been an adoption of the debt. It must suffice briefly to illustrate successively what was and what was not considered to amount to an adoption of the debt.

What amounted to adoption of debt.

In the following cases the debt was considered to have been adopted, so that the personalty became primarily liable:—Where the owner of property mortgaged by his ancestor added thereto mortgages of his own, united them, and made himself personally liable for the payment of the aggregate sum (*d*); where the purchaser of an equity of

(*z*) *Evans* v. *Cockeram*, 1 Coll. 428.

(*a*) *Lockhart* v. *Hardy*, 9 Beav. 379.

(*b*) *Vandeleur* v. *V.*, 3 Cl. & F. 82; 9 Bli. N. S. 157; *Coventry* v. *C.*, 2 P. Wms. 222; 1 Str. 596.

(*c*) *Scott* v. *Beecher*, 5 Madd. 96.

(*d*) *Townsend* v. *Mostyn*, 26 Beav. 72.

redemption entered into a covenant directly with the *mortgagee* to pay him the debt, and there was a new proviso for redemption on repayment (*e*); where a person bought an estate, and to secure the purchase-money gave a charge on the estate and covenanted to pay it (*f*).

In the following cases it was considered that there was no adoption of the debt:—Where the deceased obtained a *small* further advance and gave an additional security for the whole sum due (*g*); where he entered into a covenant to pay a higher rate of interest (*h*); where he obtained an additional advance to pay off arrears of interest on the mortgage and the simple contract debts of the person from whom he took the estate (*i*); where a man bought subject to a mortgage, but had no contract or communication with the mortgagee, and showed no intention to transfer the debt from the estate to himself, beyond merely giving a necessary indemnity against the debt to the vendor (*k*). Nor was a charge of debts on his estate by an heir or devisee an adoption of the mortgage debt of the ancestor or devisor (*l*). What not.

2. *The effect of Locke King's Act* (*m*).

By this statute it is enacted that, "When any person "shall, after the passing of the Act, die seised of or entitled "to any estate or interest in any land or other heredita- "ments which shall at the time of his death be charged "with the payment of any sum or sums of money by way "of mortgage, and such person shall not by his will or "deed or other document have signified any other or con- "trary intention, the heir or devisee to whom such land "or hereditaments shall descend or be devised shall not be 17 & 18 Vict. c. 113, s. 1.

(*e*) *Oxford* v. *Rodney*, 14 Ves. 417.
(*f*) *Billinghurst* v. *Walker*, 2 Bro. C. C. 608.
(*g*) *Ancaster* v. *Mayer*, 1 Bro. C. C. 454; *Swainson* v. *S.*, 6 De G. M. & G. 648.
(*h*) *Shafto* v. *S.*, 1 Cox, 207.
(*i*) *Tankerville* v. *Fawcett*, 1 Cox, 237.
(*k*) *Woods* v. *Huntingford*, 3 Ves. 132.
(*l*) *Lawson* v. *L.*, 3 Bro. P. C. Towl. ed. 424.
(*m*) 17 & 18 Vict. c. 113.

" entitled to have the mortgaged debt discharged or satis-
" fied out of the personal estate or any other real estate of
" such person; but the land or hereditaments so charged
" shall as between the different persons claiming through
" or under the deceased person be primarily liable to the
" payment of all mortgage debts with which the same shall
" be charged, every part thereof according to its value
" bearing a proportionate part of the mortgage debts
" charged on the whole thereof: provided always that
" nothing herein contained shall affect or diminish any
" right of the mortgagee on such lands or hereditaments
" to obtain full payment or satisfaction of his mortgage
" debt either out of the personal estate of the person so
" dying as aforesaid or otherwise: provided also that
" nothing herein contained shall affect the rights of any
" person claiming under or by virtue of any will, deed or
" document already made or to be made before the 1st day
" of January, 1855 " (*n*).

Limits of its operation.

(1.) It is to be observed with respect to this statute, first that it only applies to the administration of the estates of persons dying on or after the 1st of January, 1855.

(2.) Secondly, that it comprehends mortgages of freeholds and copyholds (*o*), but not mortgages of leaseholds, these not being hereditaments (*p*). Of course it does not affect mortgages of other personalty.

(3.) It only applies to cases in which there is a definite or specific charge on a specified estate (*q*), and it was held not to apply to a vendor's lien (*r*); nor does it apply to a charge created by a partner on his separate real estate to secure a debt of the partnership firm (*s*); nor where the land is entailed (*t*).

(*n*) S. 1.
(*o*) *Piper* v. *P.*, 1 J. & H. 91.
(*p*) *Solomon* v. *S.*, 10 Jur. N. S. 331; *Hill* v. *Wormsley*, 4 Ch. D. 665.
(*q*) *Hepworth* v. *Hill*, 30 Beav. 476.
(*r*) *Hood* v. *H.*, 6 W. R. 747.
(*s*) *Ritson* v. *R.*, (1898) 1 Ch. 677; (1899) 1 Ch. 128; 65 L. J. Ch. 77.
(*t*) *Anthony* v. *A.*, (1893) 3 Ch. 498; 62 L. J. Ch. 1004.

(4.) It applies to equitable as well as to legal mortgages (*u*).

(5.) It applies not only as between the real and personal representatives of the deceased, but also in favour of the Crown claiming the personalty for want of next of kin (*x*).

What amounts to contrary intention.

It will be seen that the general effect of the statute is to reverse the *primâ facie* rule as to the fund primarily liable. Before, the personalty was first applied, unless an intention to exonerate it was manifest. Since, the mortgaged estate is first applied, unless a contrary or other intention is manifest. There has been much dispute as to what under the Act would suffice to manifest a contrary intention. In *Woolstencroft* v. *W.* (*y*), it was said by Lord Campbell, that "the same rule should be observed with "respect to exempting the mortgaged land from payment "of the mortgage money as was before observed with "respect to exempting the personal estate." That was to say, "that as it was before necessary to show an intention "not only to charge the realty, but also to exonerate the "personalty, so under the statute it would be necessary to "show the reverse intention in both respects; not only to "charge the personalty, but also to exonerate the mort-"gaged estate." This was dissented from in *Eno* v. *Tatham* (*z*), where it was held, that a direction to pay the debt out of another fund was sufficient to discharge the mortgaged estate. Mere general directions for the payment of debts were not considered sufficient (*a*); but where the personal estate was bequeathed upon trust to pay (*b*), or subject to the payment of debts (*c*), the mortgaged estate was held to be exonerated.

(*u*) *Pembroke* v. *Friend*, 1 J. & H. 132.

(*x*) *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186.

(*y*) 2 De G. F. & J. 347.

(*z*) 11 W. R. 475; 4 Giff. 181.

(*a*) *Pembroke* v. *Friend*, *sup.*; *Coote* v. *Lowndes*, 10 Eq. 376.

(*b*) *Moore* v. *M.*, 1 De G. J. & S. 602.

(*c*) *Mellish* v. *Vallins*, 2 J. & H. 194; and see *Campbell* v. *C.*, (1893) 2 Ch. 206; 62 L. J. Ch. 594.

3. *The Amendment Acts* (*d*).

30 & 31 Vict. c. 69, s. 1.

In order to extend the operation of Locke King's Act, and to set at rest the disputes which had arisen as to its construction, the statute 30 & 31 Vict. c. 69, was passed, enacting, first, that "In the construction of the will of any "person who may die after the 31st day of December, "1867, a general direction that the debts or that all the "debts of the testator shall be paid out of his personal "estate shall not be deemed to be a declaration of an "intention contrary to or other than the rule established "by the said Act (*e*), unless such contrary or other "intention shall be further declared by words expressly "or by necessary implication referring to all or some of "the testator's debts or debt charged by way of mortgage "on any part of his real estate" (*f*). This, it will be observed, adopts, with a slight modification, the dictum in *Woolstencroft* v. *W.* (*g*), already quoted; and it follows that now a mere direction to pay debts, or just debts, or any similar expression not necessarily pointing to the mortgage debts, are not sufficient to exonerate the mortgaged premises (*h*).

S. 2.

Secondly, it extends the operation of the Act by enacting that "in this and the previous Act the word mortgage "shall be deemed to extend to any lien for unpaid pur-"chase-money upon any lands or hereditaments purchased "by a testator" (*i*).

Cases of intestacy omitted.

It was soon observed that this statute made no mention of the case of intestacy, and in such a case an heir-at-law was held entitled to have a lien for unpaid purchase-money discharged out of the personalty, so that he might take the purchased estate free from incumbrance (*k*). Leaseholds, moreover, were still under the old law.

(*d*) 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.
(*e*) 17 & 18 Vict. c. 113.
(*f*) S. 1.
(*g*) 2 De G. F. & J. 347.
(*h*) *Newmarch* v. *Storr*, 9 Ch. D. 12; *Rossiter* v. *R.*, 13 *ib.* 355; *Dunlop* v. *D.*, 21 *ib.* 583; and see *Colston* v. *Roberts*, 37 Ch. D. 677; 57 L. J. Ch. 943.
(*i*) S. 2.
(*k*) *Harding* v. *H.*, 13 Eq. 493.

At length, by 40 & 41 Vict. c. 34, both these defects were remedied. The previous statutes were made to apply to cases of testacy and intestacy alike, and to land or other hereditaments of whatever tenure, by which words leaseholds have been brought within the principle (*l*). Under this Act mortgaged lands include lands delivered in execution under a writ of elegit to a testator's creditors (*m*). 40 & 41 Vict. c. 34.

Under the present law a direction that the personalty shall be liable before the incumbered estate must in order to be effectual unmistakeably refer to or describe the mortgage debt (*n*).

V. *The Marshalling of Assets.*

1. *As between beneficiaries.*

It was remarked, when speaking of the order of the administration of assets as regards the priorities between the respective classes of beneficiaries, that whatever their claims *inter se*, these did not in the least prejudice a creditor's rights and remedies as against any portion of the assets of the deceased. But it is clear that the order of administration would be interfered with if a creditor chose to resort to the assets in an order different from that which the law prescribes as between the beneficiaries. If, for instance, the creditor sought to recover his debt by an execution against devised lands, instead of by a personal judgment against the executor, the effect, unless counteracted by some means, would be to reduce the benefit conferred upon a specific devisee, and to increase that of the residuary legatee, whereas the law of administration distinctly prefers the former to the latter.

(*l*) *Drake* v. *Kershaw*, 37 Ch. D. 674; 57 L. J. Ch. 599; *Brooman* v. *Withall*, (1894) 3 Ch. 558; 63 L. J. Ch. 855.

(*m*) *Anthony* v. *A.*, (1892) 1 Ch. 450; 61 L. J. Ch. 434.

(*n*) *Nelson* v. *Page*, 7 Eq. 25; *Lewis* v. *L.*, 13 Eq. 219; *Sackville* v. *Smyth*, 17 Eq. 153; *Elliott* v. *Dearsley*, 16 Ch. D. 322; *Hannington* v. *True*, 33 Ch. D. 195; 55 L. J. Ch. 914; *Clarke* v. *White*, (1899) 1 Ch. 316; 68 L. J. Ch. 104.

Principle of marshalling.

Aldrich v. *Cooper*.

This tendency is counteracted by the application of the principle known as marshalling. The principle, as laid down in the leading case of *Aldrich* v. *Cooper* (*o*), is that if one person has two funds to which he may resort for the satisfaction of his demands, he shall not by his election disappoint another person who has only one fund. If, therefore, he chooses to resort to the only fund upon which the other has a claim, that other is allowed to stand in his place *pro tanto* against the fund to which otherwise he could not have resorted.

In the case we have put the creditor has an option of two, or it may be several different funds, out of either or any of which he may recover his debt. The beneficiaries have each only his own particular fund available to him, the heir the descended land, a specific legatee the property specifically bequeathed, and so on. To restore, then, the order of administration which the creditor's election has disturbed, the law permits any beneficiary who is disappointed by the creditor's actions to stand in the creditor's place as against any fund which is in the order of administration liable before his own.

It is not necessary, even if it be possible, to illustrate from cases all the possible forms of marshalling between beneficiaries which this broad principle would authorise. A few instances will serve as well as more.

Marshalling for paraphernalia.

We have seen that one of the last funds resorted to for the payment of debts in the order of administration is the paraphernalia of the widow. If the place ascribed to it in the last section be correct, it would follow that, with the exception of an appointee under a general power, the widow might marshal the assets as against all the other beneficiaries; in other words, if a creditor deprived her of her paraphernalia, she could claim to stand in his place to the extent of its value as against all the specific devisees and legatees, and *à fortiori* against others of earlier liability,

(*o*) 8 Ves. 382; 2 W. & T. L. C. 80.

such as the heir. We find instances in which she has successfully claimed to marshal against general pecuniary and even specific legatees (*p*).

Again, specific legatees and devisees, who stand on an equal footing at the head of all the beneficiaries claiming out of the testator's property, are entitled to marshal all the assets real or personal not specifically bequeathed or devised. If the creditor enforces a remedy at their expense, they can stand in his place as against every fund antecedently liable. The cases above cited to establish their position in the order of administration, apply equally here. As between themselves specific legatees and devisees (including, as we have shown, residuary devisees) have no right to marshal, their liabilities being equal (*q*). For specific legatees and devisees.

Pecuniary legatees, again, may marshal against lands devised subject to debts (*r*); *à fortiori* against lands descended to the heir (*s*). For pecuniary legatees.

Similarly a devisee of lands charged with debts may marshal against lands descended (*t*), lands devised on trust for sale for payment of debts, and the general personal estate (*t*); while the heir can only marshal as against the two last named funds (*u*), and devisee of lands devised on trust for sale to pay debts only against the general personalty. For devisee of lands charged, &c.

Not only is the doctrine of marshalling applied as between beneficiaries when one or more of them has or have been disappointed by the election of a creditor; it is also utilised as between the beneficiaries themselves.

(*p*) *Tipping* v. *T.*, 1 P. Wms. 730; *Boynton* v. *Parkhurst*, 1 Bro. C. C. 576; *Tynt* v. *T.*, 2 P. Wms. 542.

(*q*) *Haslewood* v. *Pope*, 3 P. Wms. 324; *Emuss* v. *Smith*, 2 De G. & Sm. 722; *Le Bas* v. *Herbert*, (1894) 3 Ch. 250; 63 L. J. Ch. 662.

(*r*) *Rickard* v. *Barrett*, 3 K. & J. 289.

(*s*) *Sproule* v. *Prior*, 8 Sim. 189; *Galton* v. *Hancock*, 2 Atk. 424; cf. *Bate* v. *B.*, 43 Ch. D. 600; 59 L. J. Ch. 277; *Re Stokes*, 67 L. T. 223; *Brothwood* v. *Keeling*, (1895) 2 Ch. 203; 64 L. J. Ch. 494.

(*t*) *Harmood* v. *Oglander*, 8 Ves. 106.

(*u*) *Hanby* v. *Roberts*, Amb. 128.

Marshalling as between beneficiaries themselves.

Thus if a testator charges some legacies on real estate, but not others, and the personal estate proves insufficient to pay them all, the legacies charged on the real estate will be thrown thereon in order to leave the personalty for the payment of the other legacies. Or if the privileged legatees choose to exhaust the personalty, the others may *pro tanto* stand in their place as against the real estate charged (*x*). The principle is clearly the same as in the previous case, the legatees whose legacies are charged on land having two funds at their disposal, the other legatees only one.

When not applied.

The doctrine of marshalling, however, will not be employed so as to alter the effect of the rules for the construction of legacies. Thus we shall see, when classifying and describing the different species of legacies, that legacies charged on land are interpreted by the rules of common law, and accordingly they fail altogether if the legatee dies before they are actually paid, while legacies not so charged are interpreted on the principles of ecclesiastical law, which considers them to vest on the death of the testator, and so to be transmissible to the legatee's representatives if he dies before payment. If, then, the legatee of a legacy charged on land dies before payment, the Court will not by means of the doctrine of marshalling throw this legacy on the personal estate so as to cause it to vest for the benefit of the legatee's representatives (*y*).

2. *Marshalling between creditors.*

As between creditors only.

Questions of marshalling formerly arose very frequently between creditors. As long as simple contract creditors had no claim upon real assets unless charged with debts, equity compelled specialty creditors, who could resort to these assets, to seek their remedy thereout, so as to leave

(*x*) *Hanby* v. *Roberts*, Amb. 128; *Bonner* v. *B.*, 13 Ves. 379.

(*y*) *Prowse* v. *Abingdon*, 1 Atk. 482; *Pearce* v. *Loman*, 3 Ves. 135; *Henty* v. *Wrey*, 21 Ch. D. 332; 53 L. J. Ch. 667.

the personal assets for the creditors by simple contract; or if the specialty creditors exhausted the personalty the simple contract creditors were suffered to stand in their place against the real assets (*z*); but only to the extent to which the personalty had been applied in payment of the specialty debts. They were not entitled to have a larger fund than they had originally (*a*). These forms of marshalling are, however, no longer necessary. Neither can any question now arise as to marshalling between secured and unsecured creditors of any class, the rules of administration being now, as we have seen, regulated by those of bankruptcy.

3. *Marshalling generally.*

Limits of the principle.

It is necessary before dismissing the subject of marshalling to guard against a too comprehensive interpretation of the principle. Thus it does not apply as between creditors of different persons. If a person has a demand against A. and B. jointly and severally, a creditor of B. alone cannot compel the former creditor to apply to A. alone so as to leave the property of B. free for his separate debts, unless at least there is some equity between A. and B. themselves which would entitle B. himself to a remedy against A. (*b*). Moreover, the principle does not apply where its operation would prejudice the creditor's rights, as, for instance, where he has not an equal right over the two funds to which he may resort (*c*).

Again, there must be not only two claimants from the same person, but one of them must have two funds belonging to the same person to which he can resort. Thus, a legatee in a will of a tenant in tail of lands could not throw judgment creditors exclusively on those lands in exonera-

(*z*) *Sagitary* v. *Hyde*, 1 Vern. 455.
(*a*) *Cradock* v. *Piper*, 15 Sim. 301.
(*b*) *Exp. Kendall*, 17 Ves. 520.
(*c*) *Webb* v. *Smith*, 30 Ch. D. 192.

tion of the general assets, since the lands belong to the heir, and are subject to debts only by virtue of statute (*d*).

Marshalling not applied for charities.

Again, we have elsewhere seen that the Court would not, prior to the Mortmain and Charitable Uses Act, 1891 (*e*), marshal assets in favour of charities. Thus, if real and personal estate, including chattels real, were given on trust to sell for the payment of debts and legacies, and the residue was bequeathed to a charity, the debts and ordinary legacies were not thrown on the proceeds of land so as to leave the pure personalty for the charity (*f*). The same rule applied in the case of a simple pecuniary legacy (*g*). But this rule did not in the least prevent the testator from himself producing the effect of marshalling by directing the payment of his charitable legacies to be made out of pure personalty (*h*), and such a direction was carried into effect by allowing, if necessary, the charities to stand against realty in the place of creditors who exhausted the pure personalty (*i*). But by reason of the last-mentioned statute these rules only apply now to the wills of testators who died before August 5th, 1891, that statute having enacted that as regards testators dying after that day land may be devised for charitable purposes (subject to its being sold within a year), and the moneys secured on land shall not be deemed to be land within the Mortmain Acts.

(*d*) *Douglas* v. *Cooksey*, 2 I. R. Eq. 311; see also *In re International, &c. Soc.*, 2 Ch. D. 476.

(*e*) 54 & 55 Vict. c. 73.

(*f*) *Mogg* v. *Hodges*, 2 Ves. sr. 52.

(*g*) *Ridges* v. *Morrison*, 1 Cox, 180; *Cherry* v. *Mott*, 1 My. & Cr. 123.

(*h*) *Robinson* v. *Geldard*, 3 Mac. & G. 735; *Ravenscroft* v. *Workman*, 37 Ch. D. 637.

(*i*) *Att.-Gen.* v. *Mountmorris*, 1 Dick. 379; *Miles* v. *Harrison*, 9 Ch. 316; and see *Broadbent* v. *Barrow*, 31 Ch. D. 113; 55 L. J. Ch. 103; *Wegg-Prosser* v. *W.-P.*, (1895) 2 Ch. 449; 65 L. J. Ch. 49.

VI. *Marshalling Securities.*

Marshalling securities.

The doctrine of marshalling is not confined to the administration of assets, and though not strictly *à propos* to the present subject, this is a convenient place in which to refer to its application as between the creditors of living persons. Upon the same principle, that where one person has two funds to resort to, and another has only one, the former shall not disappoint the latter by depriving him of his only resource, it has been laid down that if a person who has two real estates mortgages both to one mortgagee, and afterwards only one estate to a second mortgagee, the Court will direct the first to take his satisfaction in the first place out of that estate which is not in mortgage to the second mortgagee, so as to leave the second estate, or as much of it as is not required to complete the satisfaction of the first, for the second mortgagee (*k*); and it is immaterial whether the second mortgagee has or has not notice of the first mortgage (*l*). So if one of the estates is subject to a portion, the person entitled to the portion may require the mortgagee to resort to the other estate, or, if he does not, may stand in his place against it (*m*); and the principle has been applied even in favour of a voluntary settlement (*n*).

Not to the prejudice of third persons.

Securities will not, however, be marshalled to the prejudice of third parties. For instance, if there is first a mortgage of A. and B., and then a mortgage of B. only, and then another mortgage of A. and B. to a third mortgagee without notice of the second mortgage, the securities will

(*k*) *Lanoy* v. *Athol*, 2 Atk. 446; *Flint* v. *Howard*, (1893) 2 Ch. 54; 62 L. J. Ch. 804; *Farrington* v. *Forrester*, (1893) 2 Ch. 461; 62 L. J. Ch. 996.

(*l*) *Hughes* v. *Williams*, 3 Mac. & G. 690; *Tidd* v. *Lister*, 10 Ha. 157; 3 De G. M. & G. 857.

(*m*) *Rancliffe* v. *Parkyns*, 6 Dow, 216.

(*n*) *Hales* v. *Cox*, 32 Beav. 118; and see *Exp. Alston*, 4 Ch. 168; *Exp. Salting*, 25 Ch. D. 148; 53 L. J. Ch. 415.

not be marshalled against the last mortgagee (*o*). *Secus*, if he had notice at the time of his advance (*p*).

The principle is applied also in Admiralty cases—for instance, where one person has a bond on a ship, freight and cargo, and another only on the ship and freight, the former will be required to resort primarily to the cargo, or else the latter will be allowed to stand in his place against it (*q*).

(*o*) *Barnes* v. *Racster*, 1 Y. & C. Ch. 401.

(*p*) *Re Mower's Trust*, 8 Eq. 110.

(*q*) *The Trident*, 1 W. Rob. 29; *The Arab*, 5 Jur. N. S. 417.

Section II.—Matters relative to Administration.

I. *Legacies.*
  1. *Specific Legacies.*
    (1.) *Effect of Wills Act* (1 *Vict. c.* 26).
    (2.) *What constitutes a Specific Legacy.*
    (3.) *Generally.*
    (4.) *Ademption.*
  2. *Demonstrative Legacies.*
  3. *Time of Payment and Interest.*

II. Donationes Mortis Causâ.
  1. *Conditions of.*
  2. *Place in Administration.*

I. *Legacies.*

Under the head of Administration of Assets, it was necessary to classify the different species of beneficial interests which might be bestowed by a testator. From this classification we are led to a further inquiry respecting the different modes in which legacies may be bestowed, in order to ascertain the particular characteristics of the several species. Questions of this nature continually arise on the construction of wills for the purposes of administration, and it is therefore advisable to review the consequences of the leading distinctions between the various forms of legacies, notwithstanding that it is a matter which would strictly come under the head of conveyancing rather than that of equitable jurisprudence.

Legacies—classified, defined,

Legacies are either general, demonstrative, or specific.

A general legacy is one which does not relate to any individual thing, or sum of money, as distinct from other

things of the same kind or other moneys: for instance, a bequest of "a horse," of one thousand pounds, or one thousand pounds stock. Such legacies are referred to in the Wills Act (*a*) as "bequests of personal property described in a general manner."

A demonstrative legacy is one in which, together with words of general description, such as would create a general legacy, are used additional words pointing out a particular fund out of which it is to be satisfied: for instance, a bequest of "one thousand pounds out of my East India Stock."

A specific legacy is a bequest of a particular thing or sum of money as distinguished from all others of its kind —for instance, a bequest of "my horse Dobbin," "the five hundred pounds contained in my safe," or "the debt owing to me by B."

and compared.

These distinctions are of great importance. As we have seen, in the administration of assets, the order of the application of a legacy depends upon whether it is considered to be general or specific; so that upon the construction put upon it in this respect, the question as to whether the legatee shall enjoy it or not may wholly rest. In this instance the position of a specific legatee is more advantageous than that of a person whose legacy is general. But in another respect the contrary is the case. Thus, if after a testator has given a specific legacy, the thing specifically given ceases to exist, or ceases to belong to the testator, the legacy is considered to be adeemed; the legatee entirely loses the benefit of it, and cannot claim compensation out of the general estate. We shall presently inquire more precisely what will suffice to effect an ademption. A general legacy, on the contrary, is not liable to ademption. It is payable out of any and every part of the assets not required for payment of debts, and not specifically disposed of; and all general legacies, in the

(*a*) 1 Vict. c. 26, s. 27.

case of an insufficiency of assets, are payable *pari passu*, unless the testator has given to some a priority over others (*b*). Legacies given in satisfaction of debts, or in lieu of dower, which is tantamount to a debt where the husband has at his death lands out of which the wife was at his death entitled to dower, generally speaking have priority over the general legacies (*c*); but there is no such priority if the testator by his will disposes of the lands and in effect bars the dower (*d*).

1. *Specific legacies.*

Before the Wills Act.

(1.) Before proceeding to consider in detail the different kinds of legacies, it is necessary to point out that the character of specific legacies has to some extent been modified by the Wills Act (*e*). Previously to that enactment, a will was deemed to speak, as far as concerned the property to which it related, as from the time at which it was made. When, therefore, a testator made use of such an expression as "my stock," or "my horses at B.," there could be little doubt as to what his words referred to, and such legacies were then always considered as specific (*f*).

Effect of the Act.

But by s. 24 of the above statute every will is to be construed, "with reference to the real and personal estate "comprised in it, to speak and take effect as if it had been "executed immediately before the death of the testator." Now, therefore, when the same expressions are used, in order to treat them as specific, we must consider the testator's intention to have referred to a future state of things. On the ground that this was not an admissible supposition, it was held by some judges that some stronger indication than the mere use of a personal pronoun was required under the new law to impress the legacy with a

(*b*) *Wells* v. *Borwick*, 17 Ch. D. 798; 50 L. J. Ch. 241.
(*c*) 3 & 4 Will. IV. c. 105, s. 12; *Stahlschmidt* v. *Lett*, 1 Sm. & G. 421.
(*d*) *Roper* v. *R.*, 24 W. R. 1013; *Greenwood* v. *G.*, (1892) 2 Ch. 295; 61 L. J. Ch. 558.
(*e*) 1 Vict. c. 26.
(*f*) *Kirby* v. *Potter*, 4 Ves. 748.

specific character (*g*). On the contrary, however, it has been pointed out that previous to the Wills Act, it was open to a testator to make his legacy act specifically as from his death by means of such an expression as "all the furniture which I shall be possessed of at my death," and that the effect of the Act has been to import such a clause into all wills. It has been held by high authority that there is nothing unreasonable in this, and it may be considered as established that the same words will suffice now as did formerly, to effect a specific legacy (*h*). It is true that these decisions confer upon the term specific legacy a somewhat broader meaning than it formerly had. Formerly a legacy was, in the absence of express words postponing its application until the time of death, only specific when it necessarily operated, if at all, upon some definite and certain object, and it was liable to be adeemed by any alienation of that object, or any substitution of another for it, subsequent to the date of the will. Now the general rule is the other way. Unless there is some indication of intention that the legacy shall apply only to an object belonging to the testator at the time of the will, the legacy becomes, in fact, rather generic than specific. When it comes to be carried into effect, it may happen to apply to some object which was not at all within the contemplation of the testator at the time that he made his will, but which was subsequently acquired by him, either in addition to or in substitution for objects of the same *genus* which he had at the time of the will. Though such a legacy may, of course, fail, owing to there being no property answering to it at the time of the death, it is not liable to ademption in the same manner in which specific legacies formerly were, since from the time at which it is applied, there can be no dealing with the property which will affect it. The cases cited, however, show that this

(*g*) *Goodlad* v. *Burnet*, 1 K. & J. 341.

(*h*) *Langdale* v. *Briggs*, 8 De G. M. & G. 391; *Bothamley* v. *Sherson*, 20 Eq. 304.

alteration of the character of the legacies does not prevent legacies which were formerly considered specific from being still treated as such.

But there is a distinction to be observed between such generic legacies and a legacy which was manifestly intended to refer to a distinct and particular object. If a testator uses such words as "my stock," or "my shares," or "my horses at B.," he may well be supposed to have meant such stock, shares, or horses as he should be possessed of at his death. But if he bequeaths a distinct object, such as his "horse Dobbin," or his "shares in the A. Company," his intention clearly refers not to a *genus*, but to a certain particular thing; and if, after making such a bequest, he parts with that thing, the mere fact that before his death he acquires another of the same kind which happens to be called by the same name will not prevent the legacy from being adeemed by the alienation. In such a case there is considered to be a sufficient indication of contrary intention to prevent s. 24 of the Wills Act from saving the legacy (*i*).

(2.) *What constitutes a specific legacy.*

In considering what expressions are considered to give rise to a specific legacy, it will be convenient to distinguish between the different classes of objects which may be comprised in a specific bequest.

Articles of value.

Specific legacies of valuable articles (in which money is not here included) require but little exposition. There can be rarely any question about a clause which bequeaths a horse, or a piece of furniture, or jewellery definitely to a given person. Such a bequest may evidently be for life only or absolutely. It will, however, be construed as absolute, unless expressly limited to a life interest. In the case of things *quæ usu consumuntur*, the nature of the gift generally prevents a gift over from following a life interest,

(*i*) *Re Gibson*, 2 Eq. 669; *Dresser* v. *Gray*, 36 Ch. D. 206; 56 L. J. Ch. 975; *Re Portal and Lamb*, 30 Ch. D. 50; 54 L. J. Ch. 1012.

and even if it be expressed to be for life, or for a limited period, it will be construed as absolute (*k*). When such articles constitute the testator's stock in trade, the case is different; here there is no inconsistency in directing successive interests, and such a direction will be carried into effect (*l*). The distinction must also be observed between a specific and a residuary bequest of such things. In the latter case, if there are successive interests, they will be protected by a sale of the articles and payment of the interest of the proceeds to the persons successively entitled (*m*). It has, moreover, been held that where the same clause includes a bequest of particular articles, and a gift of the residue, the whole clause will be considered as residuary, and not as specific. Thus, a gift of "all my horses and other personal estate" is deemed residuary (*n*); and so, also, where the particular expression came last; *e.g.*, a gift of "all my personal property, together with all my furniture, &c." (*o*); and a gift of "all my personal estate and effects of which I shall die possessed, which shall not consist of money or securities for money," is still more clearly residuary, and not specific (*p*).

Money. A bequest of a sum of money in a certain bag (*q*), or in the hands of a certain person (*r*), is specific. A bequest even of "all my moneys" has been so considered (*s*). But a bequest of a sum of money, followed by a direction as to its application, *e.g.*, "to purchase a ring," or "an annuity," or "government securities," is general (*t*); as is also a bequest of money "to be paid in cash" (*u*).

Debts. A debt due to the testator may be specifically bequeathed; and this may be effected either by a descrip-

(*k*) *Randall* v. *Russell*, 3 Mer. 195.
(*l*) *Phillips* v. *Beal*, 32 Beav. 25.
(*m*) *Howe* v. *Ld. Dartmouth*, 7 Ves. 137, *sup.* p. 115.
(*n*) *Fielding* v. *Preston*, 1 De G. & J. 438.
(*o*) *Fairer* v. *Park*, 3 Ch. D. 309.
(*p*) *Robertson* v. *Broadbent*, 8 App. C. 812; 20 Ch. D. 676; 51 L. J. Ch. 665.
(*q*) *Lawson* v. *Stitch*, 1 Atk. 508.
(*r*) *Hinton* v. *Priske*, 1 P. Wms. 540.
(*s*) *Manning* v. *Purcell*, 2 Sm. & G. 284; 7 De G. M. & G. 55.
(*t*) *Apreece* v. *A.*, 1 V. & B. 364; *Hume* v. *Edwards*, 3 Atk. 693; *Gibbons* v. *Hills*, 1 Dick. 324.
(*u*) *Richards* v. *R.*, 9 Pri. 226.

tion of the sum owing, *e.g.*, a bequest of "the money due on A.'s bond" (*x*), or "the money now owing to me from A." (*y*), or by a specific gift of the security itself, as of "my note of £500" (*z*). And the bequest may be specifically made for life only, as well as absolutely (*a*). In the case, again, of a bequest of part of a debt to one person, and the "remainder," or "residue" to another, both legacies are specific (*b*).

Stock. A bequest of stock, or government securities described as "my stock," or "my securities," is specific, or (since the Wills Act), perhaps, more strictly speaking, generic in character, but specific in effect (*c*). The distinctions drawn are sometimes fine (*d*). A legacy of so much, "part of my stock," has been considered as specific (*e*). A bequest of a sum of money out of stock is, on the contrary, demonstrative (*f*). If a legacy is expressed in general terms to be of so much stock, &c., instead of as so much money, it will not be deemed specific merely because the testator happens to have stock, &c., of a corresponding description, since his intention might have been that his executor should purchase such stocks out of his general personalty (*g*); but where there was a bequest of named stock in general terms, and coupled with it a direction for a sale of it, and the testator possessed some of the stock named, it was held that a specific bequest must have been intended (*h*).

Chattels real. A bequest of a lease, or of a rent out of a term of

(*x*) *Davies* v. *Morgan*, 1 Beav. 405.

(*y*) *Ellis* v. *Walker*, Amb. 309.

(*z*) *Drinkwater* v. *Falconer*, 2 Ves. sr. 623; and see *Callow* v. *C.*, 42 Ch. D. 550; 58 L. J. Ch. 698.

(*a*) *Ashburner* v. *Macguire*, 2 Bro. C. C. 108.

(*b*) *Ford* v. *Fleming*, 2 P. Wms. 469.

(*c*) *Barton* v. *Cooke*, 5 Ves. 461; *Bothamley* v. *Sherson*, 20 Eq. 304; *Callow* v. *C.*, *sup.*

(*d*) See, *e.g.*, *Mytton* v. *M.*, 19 Eq. 30; *Pratt* v. *P.*, (1894) 1 Ch. 491; 63 L. J. Ch. 484.

(*e*) *Kirby* v. *Potter*, 4 Ves. 750.

(*f*) *Ibid.*; *Deane* v. *Teste*, 6 Ves. 146, 152.

(*g*) *Partridge* v. *P.*, ca. t. Talb. 226; *Purse* v. *Snaplin*, 1 Atk. 415; *Dresser* v. *Gray*, 36 Ch. D. 205; 56 L. J. Ch. 975.

(*h*) *Ashton* v. *A.*, 3 P. Wms. 384; and see *Shaw* v. *Marten*, (1901) 1 Ch. 370; 70 L. J. Ch. 354; (1902) 1 Ch. 314.

years, is specific (*i*). On the contrary, a gift not of an annual, but of a gross sum, payable out of a term, or out of real estate, is demonstrative (*k*). And, again, this must be distinguished from a mere direction to pay a legacy out of a particular fund or estate: in this case the fund or land alone is liable (*l*). There may, also, be a specific gift of the proceeds of sale of land, whether freehold or leasehold (*m*), or of chattels (*n*).

(3.) *General characteristics.*

Specific legacy carries everything incident to it, benefits

A gift of a specific legacy carries with it everything incident to the subject-matter of the gift; such, for instance, as bonuses declared after the testator's death upon shares specifically bequeathed (*o*). Bonuses declared in his lifetime, but payable after his death, do not, however, go to the legatee (*p*). Dividends, also, declared after his death, are considered as income, and go to the legatee, notwithstanding that they may have been earned in the testator's lifetime (*q*).

and liabilities.

Conversely, liabilities attaching to the subject-matter of the gift, if arising after the testator's death, are payable by the specific legatee (*r*). But payments necessary to complete the testator's interests in the subject-matter of the gift must be distinguished from such liabilities. Such payments are, in the absence of an indication of a contrary intention, payable out of the general personal estate (*s*).

When there is an apparently specific bequest, parol evidence is admissible to show what property there is

(*i*) *Long* v. *Short*, 1 P. Wms. 403.

(*k*) *Savile* v. *Blacket*, 1 P. Wms. 778.

(*l*) *Spurway* v. *Glynn*, 9 Ves. 483.

(*m*) *Page* v. *Leapingwell*, 18 Ves. 463; *Walker* v. *Laxton*, 1 Y. & J. 557.

(*n*) *Raikes* v. *R.*, 45 Ch. D. 66; 59 L. J. Ch. 573.

(*o*) *Maclaren* v. *Stainton*, 3 De G. F. & J. 202; *Wright* v. *Tuckett*, 1 J. & H. 266.

(*p*) *Lock* v. *Venables*, 27 Beav. 598; *De Gendre* v. *Kent*, 4 Eq. 283.

(*q*) *Bates* v. *Mackinlay*, 31 Beav. 280; and see *Malam* v. *Hitchens*, (1894) 3 Ch. 578; 63 L. J. Ch. 797; *Armitage* v. *Garnett*, (1893) 3 Ch. 337; 63 L. J. Ch. 110.

(*r*) *Addams* v. *Ferick*, 26 Beav. 384.

(*s*) *Armstrong* v. *Burnet*, 20 Beav. 424.

answering to the description of it (*t*), and generally to determine whether a legacy is general or specific (*u*).

(4.) *Ademption of specific legacies.*

Two uses of the word "ademption."

In speaking of the ademption of specific legacies it is necessary to distinguish between this matter and the ademption of general legacies to children, &c., by portions or subsequent gifts given in satisfaction thereof during the testator's lifetime. The term ademption is indeed applied in both cases; but that there is a marked distinction between the two is sufficiently obvious. In the latter sense many general legacies are liable to ademption, and the principle rests on the presumed intention of the testator (*x*). In the case of the ademption of specific legacies, on the contrary, the intention or *animus adimendi* is immaterial (*y*).

Non-existence of subject-matter.

The most conclusive form of the ademption of a specific legacy is where the thing expressed to be specifically bequeathed ceases to be in existence before the testator's death; if, for instance, a house specifically bequeathed has been destroyed by fire, or a policy of assurance has been suffered to lapse (*y*). In the former case, notwithstanding that the house may have been insured, the specific bequest will not operate upon the insurance money, which will fall into the residuary estate (*z*). Similarly, if a debt is specifically bequeathed, and is afterwards received by the testator in his lifetime, the bequest is adeemed (*a*), and this notwithstanding that the money when received is again laid out in a similar manner; as, for instance, when a mortgage debt is paid off, and the money again invested on mortgage (*b*). And it makes no difference whether the debt is paid voluntarily or compulsorily (*c*).

(*t*) *Horwood* v. *Griffith*, 4 De G. M. & G. 700.

(*u*) *Att.-G.* v. *Grote*, 2 R. & M. 690.

(*x*) See *Exp. Pye*, 18 Ves. 140.

(*y*) *Stanley* v. *Potter*, 2 Cox, 182.

(*z*) *Durham* v. *Friend*, 5 De G. & Sm. 343; and see *Re Clowes*, (1893) 1 Ch. 214.

(*a*) *Rider* v. *Wager*, 2 P. Wms. 329; *Barker* v. *Rayner*, 5 Madd. 208; 2 Russ. 122.

(*b*) *Gardner* v. *Hatton*, 6 Sim. 93.

(*c*) *Ashburner* v. *Macguire*, 2 Bro. C. C. 108; *Stanley* v. *Potter*, *sup.*

Removal of subject-matter.

Ademption may, moreover, be occasioned by less conclusive changes in the property than these. Thus, a specific legacy of goods, described as being in a particular place, will be adeemed by their removal to another place (*d*), unless the removal is only temporary or accidental; as, for instance, for purposes of repair, or by reason of a fire (*e*). Removal is of no effect unless the words of the bequest have evident reference to a given locality (*f*).

Change of form.

Again, where stock which has been specifically bequeathed has been subsequently sold out by the testator, the bequest is thereby adeemed (*g*); and this will be the case even if the money realised is again laid out in similar stock (*h*). A mere change in the name or form of the stock—for instance, by a parliamentary conversion—will not, however, cause an ademption (*i*), nor will a transfer thereof from trustees to the testator (*k*).

Ademption, moreover, will not be effected by any dealing with the stock unknown to the testator or without his authority (*l*). So if he becomes insane, the dealings of others with his property will not as a rule be suffered to affect bequests which he may have made (*m*). But a sale of personalty by order *of the Court in Lunacy*, without any reservation of the rights of legatees, has been held to effect an ademption of a specific bequest (*n*).

(*d*) *Green* v. *Symonds*, 1 Bro. C. C. 129, n.

(*e*) *Brooke* v. *Warwick*, 2 De G. & Sm. 425; *Chapman* v. *Hart*, 1 Ves. sr. 271; *Rawlinson* v. *R.*, 3 Ch. D. 302.

(*f*) *Norris* v. *N.*, 2 Coll. 719.

(*g*) *Lee* v. *L.*, 27 L. J. Ch. 824.

(*h*) *In re Gibson*, 2 Eq. 669; *Luard* v. *Lane*, 14 Ch. D. 856; but see *Re Johnstone's Settlement*, *ib.* 162.

(*i*) *Partridge* v. *P.*, ca. t. Talb. 226.

(*k*) *Dingwell* v. *Askew*, 1 Cox, 427.

(*l*) *Shaftesbury* v. *S.*, 2 Vern. 747, 748, n. 2; *Basan* v. *Brandon*, 8 Sim. 171.

(*m*) *Taylor* v. *T.*, 10 Ha. 475.

(*n*) *Jones* v. *Green*, 5 Eq. 555; *Freer* v. *F.*, 22 Ch. D. 622; 52 L. J. Ch. 301; but see *Anderson* v. *London City Mission*, (1894) 2 Ch. 577; 63 L. J. Ch. 772.

2. *Demonstrative legacies.*

Characteristics.

A demonstrative legacy so far resembles a specific legacy that it will not abate with the general legacies until the fund out of which it is payable is exhausted; it so far resembles a general legacy that it will not be liable to ademption by the alienation or non-existence of the property indicated for its payment. It is considered that the primary object is the gift of the legacy, the indication of the particular fund being a matter subsidiary or directory, and not of the essence of the gift (*o*). The testator may, nevertheless, show such an intention that a legacy shall be paid out of one fund only, as to effectually make its payment conditional upon the existence of that fund (*p*).

Legacies only apparently demonstrative.

Attention must be called to some cases in which a legacy apparently demonstrative is in effect specific. A bequest of money out of stock, as of "£1,000 out of my Three per Cents.," is demonstrative; but, as we have seen, a bequest of "£1,000 stock, part of my Three per Cent. stock," is deemed to be specific (*q*); and similarly, a bequest of one article or more out of a number of the same kind is specific, and gives the legatee a right to select (*r*).

3. *Time of payment of legacies, and interest.*

There are also important distinctions between the different kinds of legacies as regards the time at which they are payable, from which time interest runs thereon.

Specific legacies.

Specific legacies are payable and interest runs thereon from the death of the testator, from which time also, as we have seen, dividends accrue to the legatee (*s*). The case of a specific bequest of a reversionary interest is evidently an exception, there being no claim then until the reversion falls into possession.

(*o*) *Savile* v. *Blacket*, 1 P. Wms. 777; *Vickers* v. *Pound*, 6 H. L. 885.

(*p*) *Coard* v. *Holderness*, 22 Beav. 391.

(*q*) *Kirby* v. *Potter*, 4 Ves. 748.

(*r*) *Richards* v. *R.*, 9 Pri. 219; *Jacques* v. *Chambers*, 2 Coll. 435.

(*s*) *Barrington* v. *Tristram*, 6 Ves. 345; *Bristow* v. *B.*, 5 Beav. 289.

General legacies.

General legacies, on the contrary, are not, unless the testator expressly fixes a time for their payment, payable until the expiration of twelve months after his decease, and accordingly, as a rule, they only carry interest from that time (*t*). But the testator may by expressed intention accelerate or postpone their payment (*u*), and in these cases interest is payable from the directed time of payment (*v*).

Exceptional cases.

There are some exceptions to this rule. Thus, where a legacy is given in satisfaction for a debt, it is payable at and carries interest from the death (*x*); but not so a legacy given to a widow in lieu of dower or freebench, as to which she is put to her election (*y*). And where a parent, or person *in loco parentis*, bestows a legacy upon an infant, the Court will generally give interest from the death by way of maintenance (*z*), notwithstanding that the will contains a provision for the maintenance of the child out of the income of the legacy or out of the income of a share of residue given to him equally with the other children. Sect. 43 of the Conveyancing Act, 1881, must be treated as incorporated with every will to which it is applicable (*a*). But where an entirely separate fund for maintenance is provided, the case is taken out of the exception, and falls within the general rule (*b*); and so where the child is adult (*c*). A legacy charged upon real property is also payable at the testator's death, and from that time interest runs (*d*); and if given subject to a life interest, interest is payable from the death of the tenant for life (*e*); but not so where real property is devised upon trust for conversion

(*t*) *Child* v. *Elsworth*, 2 De G. M. & G. 679; *Wood* v. *Penoyre*, 13 Ves. 333.

(*u*) *Re Tinkler's Estate*, 20 Eq. 456; *Lord* v. *L.*, 2 Ch. 782.

(*v*) *Londesborough* v. *Somerville*, 19 Beav. 295.

(*x*) *Clark* v. *Sewell*, 3 Atk. 99.

(*y*) *Bignold* v. *B.*, 45 Ch. D. 496; 59 L. J. Ch. 737.

(*z*) *Beekford* v. *Tobin*, 1 Ves. sr. 310; *Wilson* v. *Maddison*, 2 Y. & C. Ch. 372.

(*a*) *Woodroffe* v. *Moody*, (1895) 1 Ch. 101; 64 L. J. Ch. 174.

(*b*) *Re Rouse's Estate*, 9 Ha. 649; *Re George*, 5 Ch. D. 837.

(*c*) *Raven* v. *Waite*, 1 Swanst. 553

(*d*) *Maxwell* v. *Wettenhall*, 2 P. Wms. 26.

(*e*) *Waters* v. *Boxer*, 42 Ch. D. 517; 58 L. J. Ch. 750.

and payment of legacies out of the proceeds; in this case it appears that the general rule applies (*f*). The distinction seems to be based on the general principle elsewhere observed (p. 191), that whereas purely personal legacies follow the rules of civil law, as expounded by the ecclesiastical courts, legacies charged on land are treated according to the doctrines of the common law.

Demonstrative legacies.

A demonstrative legacy, as regards the time of payment and the accrual of interest, resembles a general and not a specific legacy (*g*).

Rate of interest.

The rate of interest usually charged is four per cent. (*h*), and compound interest will not be paid unless directed by the will (*i*), or there is a breach of trust by the executor (*k*).

II. *Donationes Mortis Causâ.*

Definition.

English equity has derived from the Roman law a mode of disposition intermediate in character between a specific legacy and a gift *inter vivos*, namely, the *donatio mortis causâ*, and in doing so it has in the main also adopted the principles by which these gifts were regulated by Roman law. The purpose of a definition of the *donatio mortis causâ* is best served by stating the necessary conditions of such a gift. In doing so we shall indicate its character fully, by pointing out in what respects it resembles, and in what it differs from a legacy on the one hand, and a gift *inter vivos* on the other.

1. *Conditions of* donatio mortis causâ.

Must be made in view of death.

(1.) As in Roman Law, so in English, a *donatio mortis causâ* is only valid when made in near contemplation of

(*f*) *Turner* v. *Buck*, 18 Eq. 301; *Whittaker* v. *W.*, 21 Ch. D. 657; 51 L. J. Ch. 737.

(*g*) *Mullins* v. *Smith*, 1 Dr. & S. 210, *per* Kindersley, V.-C.

(*h*) *Wood* v. *Briant*, 2 Atk. 523.

(*i*) *Arnold* v. *A.*, 2 My. & K. 365.

(*k*) *Raphael* v. *Boehm*, 11 Ves. 92; 13 *ib.* 590.

death (*l*). It is not, it seems, necessary for the donor absolutely to express the gift to be made in close expectation of death; this may be presumed from the circumstances of the case, if the donor is evidently and to his own knowledge near death (*m*).

This condition is evidently implied in the name itself, and it distinguishes the *donatio mortis causâ* from both a legacy and a gift *inter vivos*.

Must be complete only at death.

(2.) The gift must be conditioned to take complete effect only after the donor's death (*n*); but in this case, as before, the condition need not be expressly declared. If the gift is made in evident contemplation of death, the law will imply an intention that it is to be absolute only in the event of death (*o*).

Contrast in Roman law.

There were two modes of *donatio mortis causâ* recognised at Rome; in one, the subject of the gift was given on condition that it should become the property of the donee in the event of the donor's death; in the other, the subject of the gift became at once the property of the donee, but on condition that he should return it to the donor in the event of his recovery. English equity recognises only the former of these modes, a gift under a suspensive condition. Such a gift is in this respect analogous to a legacy, being revocable during the donor's life, and is accordingly contrasted with a *donatio inter vivos*.

Delivery necessary.

(3.) The gift must be completed by a delivery of the subject-matter thereof (*p*). But in the application of this rule, it must be observed that a clear constructive delivery is deemed tantamount to actual delivery. Thus, delivery to an agent of the donee or to some one on his behalf will suffice (*q*). And an antecedent delivery to the donee, in the first instance as a bailee, was held to satisfy the condi-

(*l*) Inst. II., 7, 1; *Duffield* v. *Elwes*, 1 Bli. N. S. 530; *Edwards* v. *Jones*, 1 My. & Cr. 233.

(*m*) *Miller* v. *M.*, 3 P. Wms. 356; *Lawson* v. *L.*, 1 P. Wms. 441.

(*n*) *Edwards* v. *Jones*, *sup.*

(*o*) *Gardner* v. *Parker*, 3 Madd. 184.

(*p*) *Tate* v. *Hilbert*, 2 Ves. jr. 120; 4 Bro. C. C. 286.

(*q*) *Moore* v. *Darton*, 4 De G. & Sm. 517.

tion, the character of the possession having changed before the death (*r*). So, also, will a delivery by an agent of the donor at the donor's request; but not a delivery by the donor to his own agent (*s*). Again, a delivery by symbol is equivalent to an actual delivery; thus, for instance, the delivery of the key of a box with intent to give the contents is equivalent to a delivery of its contents (*t*); but such a delivery must be distinguished from that of the delivery of a key to a person for some other purpose, as to a housekeeper, for the purpose of safe custody (*u*). The case of negotiable instruments, which are in some sense symbols of choses in action, rests on a different principle, which will be presently considered.

Property incapable of being given *mortis causâ*.

In this respect a *donatio mortis causâ* is contrasted both with a legacy and with a gift *inter vivos*, which may be effected by deed without delivery. A peculiar effect of this condition, acting in connexion with the equally essential condition that the gift is to take effect absolutely only in case of death, has been to render some kinds of property seemingly incapable of being the subject of a *donatio mortis causâ*. A chose in action may, indeed, be generally effectually given by the delivery of the means of its enforcement; thus, a bond (*x*), a mortgage deed (*y*), a promissory note or cheque payable to the donor or his order, though not indorsed (*z*), and other similar instruments (*a*), may be transferred by *donatio mortis causâ*.

Cheque, &c.

But it has been considered that the *donor's* cheque cannot be validly so given, a cheque being nothing more than an

(*r*) *Cain* v. *Moon*, (1896) 2 Q. B. 283; 65 L. J. Q. B. 587; *Winter* v. *W.*, 4 L. T. N. S. 639.

(*s*) *Farquharson* v. *Cave*, 2 Coll. 356, 367.

(*t*) *Jones* v. *Selby*, Prec. Ch. 300; but see *Robson* v. *Hamilton*, (1891) 2 Ch. 559; 60 L. J. Ch. 851.

(*u*) *Trimmer* v. *Danby*, 25 L. J. Ch. 424; *Hawkins* v. *Blewitt*, 2 Esp. 663.

(*x*) *Snelgrove* v. *Bailey*, 2 Atk. 214.

(*y*) *Duffield* v. *Elwes*, 1 Bli. N. S. 497.

(*z*) *Veal* v. *V.*, 27 Beav. 303; *Austin* v. *Mead*, 15 Ch. D. 651; 50 L. J. Ch. 30; *Clement* v. *Cheesman*, 27 Ch. D. 631; 54 L. J. Ch. 158.

(*a*) *Moore* v. *Darton*, *sup.*; *Amis* v. *Witt*, 33 Beav. 619. See *Bartholomew* v. *Menzies*, (1902) 1 Ch. 680.

order for the delivery of a certain sum of money, which order is revoked by the death of the drawer. The argument would be that a cheque is not itself a delivery of the money, and that from its nature it cannot be made conditional on death (*b*). But where a banker's deposit note was given with a form of cheque endorsed and filled in the *donatio* was sustained, the intention to give the deposit note not being defeated by the fact of the indorsement (*c*). On similar reasoning, it has been held that a delivery of receipts for annuities (*d*), or of railway scrip (*e*), will not effect a *donatio mortis causâ*.

Where a cheque given is in fact actually negotiated before the death, the gift has been held to be complete and effectual (*f*), but in that case it would seem that the feature of revocability which is essential to *donationes mortis causâ* is wanting, and that, therefore, if such a gift is sustainable at all it must be rather as a transaction *inter vivos* than as one of the class we are now considering.

Trust created.

A *donatio mortis causâ* may not only be given absolutely, but may be made subject to a trust for a third person (*g*), or coupled with a trust for some particular purpose, or charged with a condition (*h*).

Imperfect *donationes mortis causâ*.

(4.) When speaking of voluntary gifts *inter vivos* (*i*), it was pointed out that it was open to a donor to confer a benefit either by a direct transfer of his property, or by the creation of a trust in favour of the intended beneficiary, and it was seen that an imperfect attempt to effect a direct gift would not be assisted by considering it as a declaration of trust. A similar principle applies to *donationes mortis causâ*. The donor may if he chooses bequeath

(*b*) *Tate* v. *Hilbert*, 2 Ves. jr. 120; *Hewitt* v. *Kaye*, 6 Eq. 198; *Re Beak's Estate*, 13 Eq. 489; *Austin* v. *Mead*, 15 Ch. D. 651; *Re Beaumont*, (1902) 1 Ch. 889.

(*c*) *Duffin* v. *D.*, 44 Ch. D. 76; 59 L. J. Ch. 420.

(*d*) *Ward* v. *Turner*, 2 Ves. sr. 431.

(*e*) *Moore* v. *M.*, 18 Eq. 474.

(*f*) *Rolls* v. *Pearce*, 5 Ch. D. 730.

(*g*) *Drury* v. *Smith*, 1 P. Wms. 405.

(*h*) *Blount* v. *Barrow*, 4 Bro. C. C. 71; *Hills* v. *H.*, 8 M. & W. 401.

(*i*) *Sup.* p. 54.

his property by a testamentary instrument, or he may in most cases bestow it by a *donatio mortis causâ*. If he chooses to adopt the former method the law imposes on him certain conditions, compliance with which is necessary to the validity of the bequest. Thus, there must be a written instrument duly witnessed and in all respects conformable to the Wills Act (*k*). If, on the contrary, he elects to make a *donatio mortis causâ*, the Wills Act indeed will not affect him (*l*), but he must comply with the conditions above laid down; particularly, he must deliver the property to the donee or to some one for him. But as in the case of a gift *inter vivos*, so in this case, his attempts to bestow his property will be futile unless they amount to one or other of these alternatives. An attempt to make a *donatio mortis causâ* which is defective from there being no delivery of the property, will not be suffered to take effect as a will. However clear the intention may be, and whether expressed by parol or in writing, unless it complies with the Wills Act so as in fact to be an actual testamentary instrument, it will not be enforced (*m*). On the other hand, if the donor clearly intends to make a testamentary gift, but omits the necessary formalities, his intention will not be carried into effect by treating his attempt as a *donatio mortis causâ*, even though there may have been an actual delivery (*n*).

It has, indeed, been sought to aid a donee by setting up an instrument as a declaration of trust, which is clearly void for informality as a will (*o*). But it is clear, both on principle and on authority, that such an attempt cannot succeed. We have seen this decidedly established as regards an instrument purporting to confer a benefit *inter*

(*k*) 1 Vict. c. 26.

(*l*) *Moore* v. *Darton*, 4 De G. & S. 519.

(*m*) *Rigden* v. *Vallier*, 2 Ves. sr. 258; *Tate* v. *Hilbert*, *sup.*; *Solicitor to the Treasury* v. *Lewis*, (1900) 2 Ch. 812; 69 L. J. Ch. 833.

(*n*) *Mitchell* v. *Smith*, 12 W. R. 941.

(*o*) *Morgan* v. *Malleson*, 10 Eq. 475.

vivos (*p*), and the principle is the same in the case of a *donatio mortis causâ* (*q*).

Again, the same principle prevents an ineffectual attempt to make a gift *inter vivos* from being supported as a valid *donatio mortis causâ*. The two things are quite distinct, and an intention to do the former by no means implies an intention in the alternative to do the latter. On the contrary, it has been laid down that the former intention is quite inconsistent with the latter (*r*).

2. *Place in administration.*

How far resembling a legacy.

For the purposes of administration a *donatio mortis causâ* is treated in some respects as a legacy. It is true that, being given to vest absolutely in the donee at the death of the donor, the donee's title does not, like that of a legatee, require the assent of the executor or administrator. Nevertheless, on a deficiency of assets, the subject of the gift is liable, like a legacy, to the debts of the deceased (*s*). If this be so, it is clear that it can only be reached by the authority of the Court, which would, we submit, be exercised only in favour of creditors, so that in the order of administration the subject of a *donatio mortis causâ* would be the last of the assets resorted to. It is, however, by statute, subject to legacy duty (*t*). Under the Customs and Inland Revenue Acts, 1881 and 1889 (*u*), it was subject to account stamp duty, payable by the donee and not out of the estate of the deceased (*x*); it is now subject to estate duty (*y*), which, however, is payable out of the residuary personal estate (*z*).

(*p*) *Sup.* p. 54; *Milroy* v. *Lord*, 4 De G. F. & J. 264.

(*q*) *Warriner* v. *W.*, 16 Eq. 340; *Richards* v. *Delbridge*, 18 Eq. 11.

(*r*) *Edwards* v. *Jones*, 1 My. & Cr. 226.

(*s*) *Smith* v. *Casen*, 1 P. Wms. 406, cited.

(*t*) 8 & 9 Vict. c. 76.

(*u*) 44 & 45 Vict. c. 12, s. 38; 52 & 53 Vict. c. 7, s. 11.

(*x*) *Thomas* v. *Foster*, (1897) 1 Ch. 484; 66 L. J. Ch. 220.

(*y*) 57 & 58 Vict. c. 30, s. 2.

(*z*) *Gribble* v. *Webber*, (1896) 1 Ch. 914; 65 L. J. Ch. 544; *Cook* v. *Culverhouse*, (1896) 2 Ch. 251; 65 L. J. Ch. 484; *Wild* v. *Stanham*, (1900) 2 Ch. 648; 69 L. J. Ch. 751.

CHAPTER III.

PARTNERSHIP.

Development of the Law of Partnership.

I. *The Nature of Partnership.*
II. *The Relations of Partners to Third Persons.*
III. *The Relations of Partners* inter se.
IV. *The Dissolution of Partnership.*

Every student of jurisprudence is familiar with the second chapter of Sir Henry Maine's "Ancient Law," in which that distinguished writer points out and illustrates the fact that as a matter of general history three agencies may usually be discerned by means of which Law is brought into harmony with society, namely, Legal Fictions, Equity and Legislation, operating, generally speaking, in the order in which they are here named. There are few departments of law in which this proposition may be more effectively illustrated than in the Laws of Partnership. It would be a digression from the purpose of this work to treat this subject historically in such a manner as fully to elucidate this statement. The era of the application of Legal Fictions to juristic conceptions of Partnership in principle and in procedure must be passed by. The treatment of the subject by Equity is more immediately before us, and the causes which long ago brought partnership transactions under the special cognizance of the Courts of Equity are sufficiently obvious.

Grounds of jurisdiction.

The facilities afforded by these Courts for taking accounts may first be mentioned. Nor was their superiority to Courts of law in this respect the only element in establishing and confirming their jurisdiction in these matters. The Chancery procedure for procuring discovery, the powers of granting injunctions and of decreeing specific performance, added to the fitness of its Courts for dealing with disputes arising between partners, the nature of which is often such as to be beyond the reach of any adequate remedy under the procedure formerly known to the Courts of common law. But quite apart from facilities in procedure, it will presently appear that in many substantive matters the principles of Equity proved most apt in regulating the special relations of partners *inter se* and towards persons dealing with them, and also in impressing certain characteristics on partnership property. It is not surprising, therefore, that, with the development of commercial pursuits, the High Court of Chancery acquired an almost exclusive jurisdiction in partnership cases; nor that, when that Court was replaced by the Chancery Division of the High Court of Justice, the dissolution of partnerships and the taking of partnership accounts should prominently appear in the business especially assigned to that Division (*a*).

Partnership Act, 1890.

But since the last edition of this work was prepared, the Legislature, without purporting to abrogate the case law on the subject, or the rules of Equity and common law then applicable thereto (*b*), has to a large extent codified the existing law. And so far, at any rate, as the principles of Partnership law (as distinguished from Procedure) are concerned, this statute is so comprehensive and complete, that a chapter dealing with the subject can now scarcely be in effect anything other than a commentary on the Act so far as it deals with principles originally established in

(*a*) Jud. Act, 1873, s. 34.

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 46; Pollock's Digest of Partnership Law, Preface, p. vii.

Equity. It is true that the division of the subject in the last edition differed but slightly from that which appears in the Act itself; but in view of the present statutory character of the law it has been thought desirable to follow precisely the lines of the Act, and this has necessitated the remodelling and, to a considerable extent, the re-writing of the chapter. We shall consider, therefore, in their order—

I. The nature of partnership:
II. The relations of partners to third persons:
III. The relations of the partners *inter se:*
IV. The dissolution of partnership.

I. *The Nature of Partnership.*

Definition.

1. Partnership is defined by the Partnership Act, 1890 (*c*), as "the relation which subsists between persons carrying on a business in common with a view of profit."

Partnerships distinguished from companies.

But this definition gives to the word a more comprehensive meaning than it bears at the present day; for public companies, as well as partnerships in the ordinary sense, would be included in such a definition, while the distinction between public companies and private partnerships is so great that they cannot now be conveniently treated together. It has therefore been limited by the exclusion of any company or association registered under the Companies Act, 1862, or any similar Act, or incorporated under any other Act of Parliament, letters patent, or Royal Charter, or engaged in working mines within and subject to the jurisdiction of the Stannaries. It must also be observed that private partnerships for general business

(*c*) 53 & 54 Vict. c. 39, s. 1, subsect. 1. N.B.—Throughout this chapter, unless the contrary appears, this statute will be referred to as "The Act" without further particularisation.

purposes may not consist of more than twenty persons, and for the business of banking of not more than ten persons.

Partnerships coming under one or other of these exceptions we shall hereafter designate companies. The law respecting them is specially regulated by statute, and forms the subject of the following chapter.

Essentials of partnership.

2. Confining ourselves, then, to the consideration of partnerships in the restricted and more familiar sense of the word, some further elucidation is needed of the definition above quoted, since many important and subtle questions have arisen respecting the precise character or extent of the sharing of profits which is required to constitute the relation of legal partnership.

A leading authority on questions of this kind was the case of *Cox* v. *Hickman* (*d*).

Cox v. *Hickman.*

In that case the facts were briefly as follows:—Benjamin and Josiah Smith carried on business under the name of Smith & Son. Becoming embarrassed, they executed a deed by which they assigned their property to trustees, and empowered them to carry on the business under the name of the Stanton Iron Company, and to divide the net income amongst the creditors in rateable proportions, with power for the majority of the creditors, assembled at a meeting, to make rules for conducting the business or to put an end to it altogether; and after the debts had been discharged the property was to be retransferred by the trustees to Smith & Son. It was sought to make the creditors liable for debts incurred in the management of the business on the ground that their participation in the profits constituted them partners therein. But it was held that no partnership was created by the deed (*e*).

The principle that a mere sharing of the profits or receipt of a payment varying with the profits of a business

(*d*) 8 H. L. 268.
(*e*) See also *Mollwo March & Co.* v. *Court of Wards*, L. R. 4 P. C. 419.

is not of itself sufficient to constitute the relationship of partnership therein, which was strongly established in this case, was shortly afterwards further amplified and defined by an Act of Parliament commonly known as Bovill's Act (*f*).

It is not, however, now necessary to set out the provisions of this statute, inasmuch as after having given rise to considerable judicial discussion (*g*) it has been repealed and re-enacted in amplified form in s. 2 of the Act as follows:—

"In determining whether a partnership does or does not exist, regard shall be had to the following rules:

"(1) Joint tenancy, tenancy in common, joint property, common property, or part-ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof" (*h*).

"(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived" (*i*).

"(3) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share or of a payment contingent on or varying with the profits of a business does not of itself make him a partner in the business; and in particular—

"(a) The receipt by a person of a debt or other

(*f*) 28 & 29 Vict. c. 86.

(*g*) See, for example, *Pooley* v. *Driver*, 5 Ch. D. 458; 45 L. J. Ch. 466; *Exp. Delhasse*, 7 Ch. D. 511; 47 L. J. Ch. 65; *Exp. Tennant*, 6 Ch. D. 303; *Walker* v. *Hirsch*, 27 Ch. D. 460; 54 L. J. Ch. 315.

(*h*) See *French* v. *Sydney*, 2 C. B. N. S. 357; 26 L. J. C. P. 181; *London Financial Assoc.* v. *Kelk*, 26 Ch. D. 107; 53 L. J. Ch. 1025.

(*i*) See *Lyon* v. *Knowles*, 3 B. & S. 556; 32 L. J. Q. B. 71.

" liquidated amount by instalments or otherwise out " of the accruing profits of a business does not of " itself make him a partner in the business or liable " as such " (*k*).

" (b) A contract for the remuneration of a " servant or agent of a person engaged in a " business by a share of the profits of the business " does not of itself make the servant or agent a " partner in the business or liable as such " (*l*).

" (c) A person being the widow or child of a " deceased partner, and receiving by way of annuity " a portion of the profits made in the business in " which the deceased member was a partner, is not " by reason only of such receipt a partner in the " business or liable as such " (*m*).

" (d) The advance of money by way of loan to " a person engaged or about to engage in any " business on a contract with that person that the " lender shall receive a rate of interest varying " with the profits, or shall receive a share of the " profits arising from carrying on the business, " does not of itself make the lender a partner with " the person or persons carrying on the business or " liable as such. Provided that the contract is in " writing and signed by or on behalf of all parties " thereto " (*n*).

" (e) A person receiving by way of annuity or " otherwise a portion of the profits of a business " in consideration of the sale by him of the good- " will of the business is not by reason only of such " receipt a partner in the business or liable as such."

(*k*) See *Cox* v. *Hickman*, 8 H. L. 268; *Exp. Tennant*, 6 Ch. D. 303.

(*l*) *Ross* v. *Parkyns*, 20 Eq. 331; 44 L. J. Ch. 610; *Reade* v. *Bentley*, 4 K. & J. 656.

(*m*) *Holme* v. *Hammond*, L. R. 7 Ex. 218; 41 L. J. Ex. 157.

(*n*) *Pooley* v. *Driver*, 5 Ch. D. 458; 45 L. J. Ch. 466; *Exp. Delhasse*, 7 Ch. D. 511; 47 L. J. Ch. 65.

This section is in effect a statutory enactment of the result of several decisions at common law and in equity, some of the most noteworthy of which are cited in illustration. The trend of the earlier decisions, previous to *Cox* v. *Hickman* (*o*), was towards the doctrine that any one who shared net profits *ipso facto* became liable as a partner. Since that leading case the law has been, as it is now by the Act declared to be, that profit-sharing is evidence, but not conclusive evidence, of partnership. We have to look not merely at the fact that profits are shared, but at the real intention and contract of the parties as shown by the whole facts of the case (*p*). But the Act is not intended to protect and will not protect persons who attempt to combine the powers of a partner with the immunities of a creditor by means of nominal loans (*q*).

Sect. 3 of the Act, which corresponds to s. 5 of Bovill's Act, provides (after the analogy of s. 3 of the Married Women's Property Act, 1882 (*r*)) that a person who lends money under such a contract as is mentioned in the previous section, that is to say, in consideration of a share of profits, cannot in the event of the debtor's bankruptcy or death in insolvent circumstances recover anything in respect of his loan until the claims of the other creditors have been satisfied in full (*s*). But the section does not deprive the lender of any security he may take for his money. If he has taken a mortgage, for example, his rights as mortgagee are not prejudiced (*t*).

3. As regards the formation of a partnership, it may here be incidentally stated that Courts of equity will not

Specific performance, when decreed.

(*o*) 8 H. L. C. 268.

(*p*) Pollock's Dig. of Partnership Law, p. 17; citing *Mollwo* v. *Court of Wards*, L. R. 4 P. C. 419; *Badeley* v. *Consol. Bank*, 38 Ch. D. 238; 57 L. J. Ch. 468; *Davis* v. *D.*, (1894) 1 Ch. 393; 63 L. J. Ch. 219.

(*q*) Pollock, p. 18. See *Pooley* v. *Driver*, *Exp. Delhasse*, *sup.*; *Syers* v. *S.*, 1 App. C. 174.

(*r*) *Supra*, p. 441.

(*s*) *Exp. Taylor*, 12 Ch. D. 366; *Exp. Mills*, 8 Ch. 569; *Re Hildesheim*, (1893) 2 Q. B. 357; *Re Mason*, (1899) 1 Q. B. 820; 68 L. J. Q. B. 466; *Re Fort*, (1897) 2 Q. B. 495.

(*t*) *Exp. Sheil*, 4 Ch. D. 789; 46 L. J. Bk. 62; *Badeley* v. *Consol. Bank*, *sup.*

usually interfere to decree specific performance of an agreement to that effect (*u*). Only when the agreement specifies a definite term, and has been partly performed, can this relief be successfully sought (*x*). The principles on which specific performance is decreed form the subject of a separate chapter (*y*).

II. *The relations of Partners to Third Persons.*

Actions between firms having a common partner.

1. Recourse to equity was sometimes needed as between one partnership and another by reason of certain technical rules of law which impeded procedure in the common law Courts. Thus, a firm or partnership at common law (in this respect contrasted with the law of Scotland) had no judicial recognition as a *persona*, as distinguished from the persons composing it. If, therefore, one partner had a claim against the partnership, for instance, for money advanced on its account, or, on the other hand, if one partner was indebted to the partnership, it was formerly necessary that in the first case all the partners (including the plaintiff) should appear as defendants, and in the second that all the partners (including the defendant) should appear as plaintiffs. But by the technical rules of law the same person could not appear as both plaintiff and defendant in an action. There was therefore a purely formal, but none the less an insuperable, hindrance to the legal remedy in such cases. Equity, however, disregarding these distinctions of form, entertained such cases and decreed as justice required, demanding only that all the parties, whether as plaintiffs or defendants, should be before the Court (*z*). For the same reason it was formerly impossible for one firm to sue another at law if there was one partner

(*u*) See p. 621.
(*x*) *England* v. *Curling*, 8 Beav. 129; *Hercy* v. *Birch*, 9 Ves. 357; *Scott* v. *Rayment*, 7 Eq. 112.
(*y*) *Infra*, p. 708.
(*z*) *Wright* v. *Hunter*, 7 Ves. 792.

common to both firms (*a*). But equity in this case, as in the other, was independent of such technical difficulties, and, having the parties before it, adjudicated upon the dealings between the firms, determining and enforcing their respective rights (*b*).

2. But the jurisdiction of equity as between partnerships and third persons was most conspicuous, first, in its completer recognition of the doctrine of agency as applicable between partners, and secondly, in the principles of its administration of the assets of partnership and partners for the benefit of creditors. In both respects the Act now embodies the results of the previous cases.

Agency of partners.

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner (*c*).

Thus, *primâ facie* every partner has full authority to deal with the partnership property for partnership purposes (*d*). But the question as to what acts fall within the expression "the usual way" is one of fact to be determined in accordance with the circumstances of each particular case, having regard to the nature of the business and the practice of persons engaged in it (*e*). Into the details of this question it is impossible here to enter (*f*). It is open to the partners as between themselves to restrict the power of any one or more of them to bind the firm, and if

(*a*) *Bosanquet* v. *Wray*, 6 Taunt. 597.

(*b*) *Mainwaring* v. *Newman*, 2 B. & P. 120.

(*c*) S. 5 of the Act.

(*d*) *Exp. Darlington, &c. Banking Co.*, 4 De G. J. & S. 581, 585.

(*e*) Lindley on Partnership, 135.

(*f*) For a comprehensive analysis of the decisions on the subject, see Pollock on Partnership, pp. 28—35.

they do so no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement (*g*).

Joint liability of partners.

3. Until comparatively recent years the rule of English equity as to the liability of partners was understood to be that every partner was liable severally as well as jointly for all the debts and obligations of the firm incurred while he was a partner. It was, however, held by the House of Lords in *Kendall* v. *Hamilton* (*h*) that as between living partners and creditors the liability for partnership debts is joint only and not several, and the Act now gives expression to the same doctrine (*i*), and also to the exception that after the death of a partner his estate is severally as well as jointly liable in a due course of administration for such debts and obligations so far as they remain unsatisfied. Thus, if a creditor obtains a judgment against two partners, he cannot afterwards sue for the same debt a third person whom he subsequently discovers to have been a partner with the first defendants. And where a firm of two partners dissolved, one retiring and the other carrying on the business with a new partner, a customer of the old firm who delivered goods to the new without notice of the change, could not sue the old partner after proving in bankruptcy against the new firm (*k*). But the case of the death of a partner presents an exception to the ordinary rule as to joint debts. Though at law only the survivor of the joint debtors could be sued, in equity recourse might always be had to the estate of the deceased partner, and the principle of *Kendall* v. *Hamilton* does not apply (*l*).

Kendall v. *Hamilton*.

Several liability of estate of deceased partner.

This rule, however, does not affect such liabilities of the partners as are on the special facts several as well as joint. If, for example, partners have joined in a breach of trust, there are several causes of action, and a judgment against

(*g*) S. 8.
(*h*) 4 App. C. 504.
(*i*) S. 9.
(*k*) *Scarf* v. *Jardine*, 7 App. C. 345; 51 L. J. Q. B. 612.
(*l*) *Beckett* v. *Ramsdale*, 31 Ch. D. 177; 55 L. J. Ch. 241; *Baring* v. *Noble*, 2 R. & M. 475.

the partners jointly does not of itself bar subsequent proceedings against their separate estates, nor does a judgment recovered against one partner discharge his co-partners (*m*).

Administration of assets.

4. In the distribution of the estates of deceased partners in Chancery, and of bankrupt and insolvent partners in bankruptcy, the partnership property is applied as joint estate in payment of the debts of the firm; and the separate property of each partner is applied in payment of his separate debts. If in either case there is a surplus, then the surplus of the joint estate is applicable for the payment of the separate debts, and the surplus of the separate estate for the payment of the partnership debts.

Illustrated.

Thus, if A. and B. are in partnership, and on A.'s death his estate is administered by the Court, both A.'s and B.'s estates being solvent, A.'s separate creditors and the creditors of the firm may prove their debts against A.'s estate, and be paid out of his assets *pari passu*. The payments thus made to creditors of the firm must then be allowed by B. in account with A.'s estate as payments made on behalf of the firm, so that in ascertaining the value of A.'s share in the partnership these payments are credited to him. If, however, A.'s estate is insolvent, and the creditors of the firm proceed to recover the full amount of their debts from the solvent partner B., B. will then become a creditor of A.'s separate estate for the amount of the partnership debts paid by B. beyond his proportion as determined by the partnership contract. If B. is also insolvent, the creditors of the firm must first resort to the partnership property, and the separate creditors of the partners to the separate estates of each respectively. The

(*m*) Pollock's Dig. p. 43; *Re Davison*, 13 Q. B. D. 50; *Blyth* v. *Fludgate*, (1891) 1 Ch. 337; 60 L. J. Ch. 66; and see *Wegg-Prosser* v. *Evans*, (1895) 1 Q. B. 108; 64 L. J. Q. B. 1; overruling *Cambefort* v. *Chapman*, 19 Q. B. D. 229; 56 L. J. Q. B. 639. See also ss. 10, 11, 12 of the Act; *Rhodes* v. *Moule*, (1895) 1 Ch. 236; 64 L. J. Ch. 122.

partnership creditors can only resort to so much of the separate property of the partners as remains after paying the separate debts in full, and the separate creditors can only resort to so much of the partnership property as remains after paying the debts of the firm in full (*n*). It follows from this rule of administration, that a partnership creditor who is indebted to a deceased or insolvent partner cannot set off his separate debt against the partnership debt due to him (*o*). And if in an action against the separate estate for a joint debt, it is shown that the separate estate is insufficient to meet the separate debts, the action is futile and will be dismissed (*p*).

Exceptional cases.

Debts arising through fraud.

Such is the general principle of the distribution of the joint and separate assets. It is, however, subject to certain exceptions. Thus, if a partnership debt is contracted by the fraud of any of the partners, the creditor so defrauded may, at his option, treat it as a joint or separate debt (*q*). If there is no joint estate of a bankrupt firm, the partnership creditors may at once resort to the separate estates; but joint estate of the most trifling amount will exclude this right (*r*).

5. On the other hand, the trustee in bankruptcy of a bankrupt firm may prove against the separate estate of any partner, where that partner has fraudulently converted partnership property to his own use without the consent or ratification of the other partners (*s*).

(*n*) See Pollock's Law of Ptship. 147 *et seq.*; *Ridgway* v. *Clare*, 19 Beav. 111; *Lodge* v. *Pritchard*, 1 De G. J. & S. 610; *Exp. Dear*, 1 Ch. D. 519.

(*o*) *Stephenson* v. *Chiswell*, 3 Ves. 566.

(*p*) *Edwards* v. *Barnard*, 32 Ch. D. 447; 55 L. J. Ch. 935.

(*q*) Pollock, 154; *Exp. Adamson*, 8 Ch. D. 807; *Re Davison*, 13 Q. B. D. 50.

(*r*) *Exp. Kennedy*, 2 De G. M. & G. 228; *Exp. Clay*, *ib.* 230, n.; *Cooper* v. *Adams*, (1894) 2 Ch. 555; 63 L. J. Ch. 847.

(*s*) *Exp. Harris*, 2 V. & B. 210; *Lacey* v. *Hill*, 4 Ch. D. 537; *Read* v. *Bailey*, 3 App. C. 94.

III. *The relations of Partners* inter se.

Actions between partners.

1. In the previous section it has been shown how the interposition of equity was necessitated in cases of dispute between partners and firms having a partner in common by reason of the technicalities of common law procedure, arising from the non-recognition of a firm as a *persona*. It is unnecessary to repeat what was there said, and of course it will be understood that at present the rules of equity in this as in other respects prevail in all divisions of the High Court.

2. Many other cases, however, come within the cognizance of equity on the ground of the particular forms of relief which it is able to give. Some of these fall more appropriately under the head of dissolution, and are accordingly postponed for the present. Others might with perfect consistency be relegated to the general headings of injunction and specific performance; but the balance of convenience nevertheless seems in favour of their consideration here.

Specific performance of articles.

Where there are articles of partnership the assistance of equity is often sought for the purpose of compelling the specific performance thereof. The general principles on which this peculiar form of relief is granted are elsewhere fully considered. It suffices here to say that questions arising on partnership articles fall entirely within those principles, the most conspicuous of which is that no such relief is given if there is an adequate remedy at law.

Illustrated.

The application of remedy in cases of partnership articles may best be illustrated by referring to cases in which specific performance has been decreed of agreements respecting the style or name of the partnership (*t*); of agreements not to carry on business within a certain area or limits of time (*u*); of agreements as to the custody and

(*t*) *Marshall* v. *Colman*, 2 J. & W. 266, 289.

(*u*) *Whittaker* v. *Howe*, 3 Beav. 383; *Turner* v. *Major*, 3 Giff. 442.

inspection of the partnership books (*x*); of agreements as to the mode of valuing the share of an outgoing or a deceased partner (*y*); of agreements giving a right of pre-emption of the share of an outgoing partner (*z*); of agreements to grant an annuity to a retiring partner (*a*); and of agreements not to divulge a trade secret (*b*). As to specific performance of agreements to refer to arbitration, see *infra*, p. 709.

It is observable that in many of these cases, the agreements being negative, the remedy of specific performance takes the form of an injunction.

Injunctions.

3. In the absence of articles of partnership, the mutual rights of the partners are determined by the general principles of law, and are equally enforceable in equity by means of the remedy of injunction. Thus acts tending to the destruction of the partnership property have been so restrained (*c*); and the same remedy has been applied where a partner has been hindered in the exercise of his legal right to partake in the management of the business (*d*). And, generally, acts inconsistent with the proper duties of partners may be restrained by injunction, even though no dissolution is sought, no countenance being given to any one of the partners who seeks by improper conduct to drive others to a dissolution (*e*). If, for example, in the articles the partners agree not to engage in any other business, equity would enforce this contract by injunction, and any profits made in such a business are to be treated as belonging to the partnership (*f*). The Act provides that, apart from any express provision in the articles, if a

(*x*) *Lingen* v. *Simpson*, 1 S. & S. 600.

(*y*) *Morris* v. *Kearsley*, 2 Y. & C. Ex. 139; *Gibson* v. *Goldsmid*, 5 De G. M. & G. 757.

(*z*) *Homfray* v. *Fothergill*, 1 Eq. 567.

(*a*) *Aubin* v. *Holt*, 2 K. & J. 66.

(*b*) *Morison* v. *Moat*, 9 Ha. 241.

(*c*) *Miles* v. *Thomas*, 9 Sim. 606; *Marshall* v. *Watson*, 25 Beav. 501.

(*d*) *Anon.*, 2 K. & J. 441; *Walker* v. *Mottram*, 19 Ch. D. 355; 51 L. J. Ch. 189.

(*e*) *Hall* v. *H.*, 12 Beav. 414; 20 *ib.* 139; 3 Mac. & G. 79; *Fairthorne* v. *Weston*, 3 Ha. 387.

(*f*) *Somerville* v. *Mackay*, 16 Ves. 382.

partner, without the consent of the other partners, carries on business of the same nature as and competing with that of the firm, he must account for any profits so made (*g*). Questions involving the application of injunctions for the protection of the goodwill of a business are considered at p. 800.

Similarly, and for similar reasons, an account may be decreed in equity without seeking a dissolution; not, however, a continuous account of the business operations. The Court will not so undertake the carrying on of a business, though it will in proper cases investigate its accounts up to the time of commencing the action (*h*). Generally the Court is reluctant to decree an account or to appoint a receiver and manager except with a view to dissolution or the sale of the business as a going concern (*i*). Account.

4. A third particular in which equity exercises beneficial influence in preserving the rights of partners is by its application of the principle of constructive trusts to cases in which a partner unconscientiously seeks to take advantage of his position to the prejudice of his co-partners. Constructive trusts where unfair advantage made.

Cases in illustration of this have already been given and commented on (*k*); and at present, therefore, mere reference will suffice to such cases as the renewal of leases and purchases of partnership property by individual partners. It must, however, be added that this equitable principle is now embodied in the Act, which provides that every partner must account to the firm for every benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or connexion (*l*).

(*g*) S. 30; *Glassington* v. *Thwaites*, 1 S. & S. 124; *Aas* v. *Benham*, (1891) 2 Ch. 244; and see *Dean* v. *McDowell*, 8 Ch. D. 345; 47 L. J. Ch. 537.

(*h*) *Loscombe* v. *Russell*, 4 Sim. 8; *Fairthorne* v. *Weston*, *sup.*

(*i*) *Baxter* v. *West*, 28 L. J. Ch. 169; *Taylor* v. *Neate*, 39 Ch. D. 538; 57 L. J. Ch. 1044.

(*k*) *Supra*, pp. 94 and 107.

(*l*) S. 29.

Partnership property defined.

5. It remains to consider under this head the principles originally formulated in equity, though now embodied in the Act, which affect the ownership and characteristics of property owned by a partnership.

The Act (*m*) declares that all property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise on account of the firm or for the purposes and in the course of the partnership business are partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

Doctrines as to real estate.

The intervention of equity which led to the establishment of this general principle mainly arose in respect of the ownership of land and the legal doctrine of joint tenancy. It was formerly very material to enquire as to land, whether it became partnership property by being brought in by one or more partners at the formation of the firm, or by being purchased subsequently out of the assets of the firm, or by being devised to the firm. But these distinctions are now to a great extent obsolete as to effect.

In the first place, it must be understood that it was always held that *modus et conventio vincunt legem*. It was and is quite open to the partners by the articles of partnership, or any other agreement between them, to determine, as between themselves, the mode of disposition of the partnership property. Our inquiry only relates to cases in which this has not been done.

Lands brought in at formation of firm.

(1.) If land belonged to the partners separately before the commencement of the partnership, or, if even it belonged to them as tenants in common, *à fortiori*, if it belonged to one of them alone, then the fact that it was used for partnership purposes did not make it partnership property (*n*).

(*m*) S. 20.

(*n*) *Burdon* v. *Barkus*, 4 De G. F. & J. 42; 8 Jur. N. S. 656; *Crawshay* v. *Maule*, 1 Swanst. 495, 523; *Roberts* v. *Eberhardt*, Kay, 159.

(2.) If lands were purchased with partnership funds, it was in some early cases held that, in the absence of express agreement, the partners occupied as joint tenants, with a right of survivorship (*o*). But it was in later cases maintained by many high authorities that lands so acquired were to be regarded as accessory to the business of the partnership, and that the right of survivorship had no application (*p*). And though the conveyance of real estate in these circumstances was taken in the name of one of the partners, yet, if purchased with partnership money, there was deemed to be a resulting trust in favour of the firm (*q*). Lands purchased with partnership funds.

The question on which such cases depended resolved itself into a question as to the purposes for which the property was bought. If for the purpose of carrying on the partnership business, or for the purpose of a speculation on account of the partnership, there was an equitable tenancy in common and no survivorship; if for the separate use of the partners, not in connexion with the business, there was a simple joint tenancy and survivorship, with which equity did not interfere (*r*).

(3.) Where lands were devised to partners, the decisions as to whether or not it was to be regarded as partnership property were very conflicting. A distinction was drawn between devised lands and purchased lands which were similarly used by a firm, in the case of *Morris* v. *Barrett* (*s*), the latter being deemed partnership property, the former not so; and a similar rule as to devised property was followed in *Brown* v. *Oakshot* (*t*) and *Phillips* v. *P.* (*u*). On the contrary, lands devised were deemed accessory to the trade and as partnership property in *Jackson* v. *J.* (*x*) and *Crawshay* v. *Maule* (*y*); and, by the more recent and strong case Lands devised.

(*o*) *Jeffereys* v. *Small*, 1 Vern. 217.

(*p*) *Elliott* v. *Brown*, 3 Swanst. 489; *Lyster* v. *Dolland*, 1 Ves. jr. 421.

(*q*) *Smith* v. *S.*, 5 Ves. 193; *Clegg* v. *Fishwick*, 1 Mac. & G. 294.

(*r*) *Bank of England case*, 3 De G. F. & J. 645.

(*s*) 3 Y. & J. 384.

(*t*) 24 Beav. 254.

(*u*) Lindley, 332, ed. 5.

(*x*) 9 Ves. 591.

(*y*) 1 Swanst. 495.

of *Waterer* v. *W.* (*z*), such lands seem to have been placed on the same footing as lands purchased; the question depending on whether they are "substantially involved in the business."

It will be observed that the above quoted words of the Act, not being confined to the acquisition of land by purchase, but including lands acquired "otherwise," in effect establish the law as declared by these later cases. But the same section provides that the legal estate in any such lands shall devolve according to the nature and tenure thereof, and the general rules of law applicable thereto, but in trust, so far as necessary, for the persons beneficially interested under the section.

Conversion of real estate in cases of partnership, when it takes place.

(4.) Where partners held real estate for partnership purposes, the question arose whether the real estate was not, even in the absence of any expressed intention of the partners, so absolutely converted into personalty as to be held by the surviving partners not in trust for the heir-at-law, but for the personal representative of the deceased partner. It was clearly settled in equity that where real estate was purchased with partnership capital, for the purposes of partnership trade, it should, in the absence of any express agreement, be considered as absolutely converted into personalty, so as to pass to the personal representatives of a deceased partner, free from dower (*a*). On the contrary, where real estate belonged to the partners at the time of their entering into partnership, or was subsequently acquired by them out of their own private moneys, or by gift, it was formerly held that conversion would not, unless by express agreement, take place, although the real estate had been used for partnership purposes in trade (*b*).

Modern rule in favour of conversion.

More recent cases, however, proceeded upon the broader principle, that where real property has been substantially

(*z*) 15 Eq. 402; and see *Davis* v. *D.*, (1894) 1 Ch. 393; 63 L. J. Ch. 219.

(*a*) *Townsend* v. *Devaynes*, 1 Mont. on Partnership, App. 97; *Fereday* v. *Wightwick*, 1 Russ. & M. 45.

(*b*) *Thornton* v. *Dixon*, 3 Bro. C. C. 199; *Phillips* v. *P.*, 1 My. & K. 649; *Balmain* v. *Shore*, 9 Ves. 500; *Cookson* v. *C.*, 8 Sim. 529.

involved in a business or trade, it was part of the partnership property, and therefore personal estate, and that it was immaterial how it was acquired by the partners, whether by descent or devise (*c*).

This question is also now determined by the Act, which provides (*d*) that where land has become partnership property it shall, unless the contrary intention appears (*e*), be treated as between the partners, including the representatives of a deceased partner, and also as between the heirs of a deceased partner and his executors or administrators, as personal and not real estate. This rule does not affect the character of any property for the purpose of the Mortmain and Charitable Trusts Act, 1888 (*f*), but such land is deemed to be converted for fiscal purposes, and is liable to probate duty (*g*).

Land purchased for re-sale converted.

Both principle and authority also point to the conclusion that conversion will take place not only where real property is acquired for the purposes of partnership in trade, but also where it is acquired with the partnership funds for the purpose of a re-sale upon a speculation not coming within the usual denomination of trade (*h*).

Conversion by agreement.

Of course, if the owners of real estate upon entering into partnership direct or agree that it shall be sold upon the death of one of them, it will be held to be absolutely converted into personalty, and will go to the personal representative, the conversion being held to have taken place at the date of the agreement (*i*).

Dealings inconsistent with conversion.

But, as already seen, the conversion of real property may be negatived not only by the agreement of the parties, but by other dealings whereby the contrary intention appears; as, for instance, if the partners procure land to be conveyed to them in equal undivided shares (*k*); and

(*c*) *Waterer* v. *W.*, *sup.*

(*d*) S. 22.

(*e*) See *Wilson* v. *Holloway*, (1893) 2 Ch. 340; 62 L. J. Ch. 781.

(*f*) *Ashworth* v. *Munn*, 15 Ch. D. 363; 50 L. J. Ch. 107.

(*g*) *Att.-Gen.* v. *Hubbuck*, 10 Q. B. D. 488; 13 *ib.* 275; 52 L. J. Q. B. 464; 53 *ib.* 146.

(*h*) *Darby* v. *D.*, 3 Drew. 495.

(*i*) *Essex* v. *E.*, 20 Beav. 442.

(*k*) *Custance* v. *Bradshaw*, 4 Ha. 315.

the result is the same, where, though purchased out of partnership capital, it is not used for the purposes of the partnership in trade (*l*). Also where real estate was purchased for the purpose of the partnership in trade, but by agreement between the partners it was to be the separate property of one of them, who took a conveyance thereof in his own name, it was held that it was not partnership property, and was liable to dower (*m*).

Reconversion.

So, likewise, property purchased with partnership capital, for partnership purposes in trade, and therefore converted into personalty, may be reconverted by the express or implied agreement of the partners. As an instance of what amounts to an implied agreement, may be mentioned a stipulation for payment of rent by the partnership to one or some of the individual partners (*n*).

IV. *The Dissolution of Partnerships.*

1. The first consideration is by what means a dissolution of a partnership may be effected.

Where term is fixed.

Generally the duration of a partnership is fixed on by the agreement of the partners. When so fixed, the agreement will not be interfered with by a Court of equity, except under special circumstances, which will be presently considered. The partnership, however, may at any time be dissolved by the common consent of all the partners (*o*). And it is quite open to the partners by their agreement to provide that the partnership shall be dissolved at the option of any one or more of them, without the consent of all. In such a case the Court may compel a partner to sign a notice of dissolution (*p*). In the absence of agree-

(*l*) *Bell* v. *Phyn*, 7 Ves. 453; *Randall* v. *R.*, 7 Sim. 271.
(*m*) *Smith* v. *S.*, 5 Ves. 193.
(*n*) *Rowley* v. *Adams*, 7 Beav. 548.
(*o*) *Hall* v. *H.*, 12 Beav. 414.
(*p*) *Hendry* v. *Turner*, 32 Ch. D. 355; 55 L. J. Ch. 562.

ment, or of the special interference of the Court, a partnership for a fixed term only expires with the efflux of the time agreed upon for its duration (*q*). If after the expiration of the agreed term the firm continue to trade as partners without making any new agreement, the original contract is deemed to be prolonged by tacit consent, and all its conditions remain in force except in so far as they are consistent with any implied term of the renewed contract. It is an implied term of the new contract that each partner has the right to instantly determine the partnership (*r*). But this right must be exercised *bonâ fide* and not for the sake of obtaining an undue advantage (*r*).

Dissolution by operation of law.

Subject to any contrary agreement between the partners, a partnership is dissolved—

(a) If entered into for a fixed term by the expiration of that term:

(b) If entered into for a single adventure or undertaking by the determination of that adventure or undertaking:

(c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership. In this case the partnership is dissolved as from the date mentioned in the notice of dissolution, or if no date is mentioned, as from the date of the communication of the notice (*s*).

By death or bankruptcy.

Again, subject to any contrary agreement, every partnership is dissolved as regards all partners by the death or bankruptcy of any partner, and at the option of the other partners it may be dissolved if any partner suffers his share of the partnership property to be charged under the Act for his separate debt (*t*).

(*q*) *Featherstonehaugh* v. *Fenwick*, 17 Ves. 298.

(*r*) *Neilson* v. *Mossend Iron Co.*, 11 App. Cas. 298; and see *Daw* v. *Herring*, (1892) 1 Ch. 284; 61 L. J. Ch. 5.

(*s*) S. 32 of the Act.

(*t*) S. 33 of the Act. As to charging shares, see s. 23.

Business becoming unlawful.

A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership (*u*). For example, a partnership between an Englishman and a domiciled foreigner is dissolved if war breaks out between England and the country of the foreigner's domicile (*x*).

The Act, in the above cited sections, in effect declares the law as it had been long established by the decisions of the Courts.

Dissolution by the Court.

On application by a partner the Court may decree a dissolution of the partnership in any of the following cases :—

Lunacy.

(a) When a partner is found lunatic by inquisition or is shown to be of permanently unsound mind; in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner.

(b) When a partner becomes in any other way permanently incapable of performing his part of the partnership contract (*y*).

Bad conduct.

(c) When a partner has been guilty of such conduct as in the opinion of the Court, regard being had to the nature of the business, is calculated prejudicially to affect the carrying on of the business (*z*).

(d) When a partner wilfully or persistently commits a breach of the partnership agreement or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him.

(*u*) S. 34.

(*x*) *Griswold* v. *Waddington*, 15 Johns. 57 ; 16 *ib.* 438 ; and see also *Esposito* v. *Bowden*, 7 E. & B. 763.

(*y*) See *Whitwell* v. *Arthur*, 35 Beav. 140.

(*z*) See *Essel* v. *Hayward*, 30 Beav. 158.

Conduct coming under this description may consist of active improprieties or of negligence. Breaches of trust or confidence (*a*), and the becoming liable to a criminal prosecution (*b*), afford good grounds for seeking a decree of dissolution (*c*). So also does persistent negligence of the partnership business by a partner whose duty it is to devote his attention to it (*d*).

The Court will not, however, regard mere disagreements or quarrels, or incompatibility of temper between partners (*e*), unless they be of such an aggravated nature as to destroy all confidence and the possibility of advantageous working (*f*).

Business loss.

(e) When the business of the partnership can only be carried on at a loss (*g*).

(f) Whenever in any case circumstances have arisen which in the opinion of the Court render it just and equitable that the partnership be dissolved (*h*).

Partnership induced by fraud.

In this place it is also appropriate to observe that if a partnership has been induced by any species of fraud or imposition, the contract may be dissolved *ab initio* at the suit of the party deceived (*i*). And in this case the party entitled to rescind is entitled to a lien on the surplus of the partnership assets, for any sum of money paid by him for the purchase of his share and for any capital contributed (*k*). Moreover the contract of partnership is one requiring *uberrima fides*.

Unless there is a distinct breach of the partnership articles, a dissolution, if decreed, will not be made retro-

(*a*) *Smith* v. *Jeyes*, 4 Beav. 503.

(*b*) *Essel* v. *Hayward*, *sup.*

(*c*) See *Atwood* v. *Maude*, 3 Ch. 373.

(*d*) *Harrison* v. *Tennant*, 21 Beav. 482.

(*e*) *Wray* v. *Hutchinson*, 2 My. & K. 235; *Goodman* v. *Whitcomb*, 1 J. & W. 589.

(*f*) *Baxter* v. *West*, 1 Dr. & S. 173; *Leary* v. *Shout*, 33 Beav. 582.

(*g*) See *Jennings* v. *Baddeley*, 4 K. & J. 78.

(*h*) S. 35 of the Act.

(*i*) *Rawlins* v. *Wickham*, 1 Giff. 355; *Huc* v. *Richards*, 2 Beav. 305; *Maycock* v. *Beaton*, 13 Ch. D. 384; *Betjemann* v. *B.*, (1895) 2 Ch. 474; 64 L. J. Ch. 641.

(*k*) S. 41 of the Act.

spective, but will operate only from the date of the judgment (*l*).

Return of premium.

2. On dissolution being decreed of a partnership entered into for a definite term, and in consideration of the payment of a premium, the Court may order the repayment of the premium or of a proportionate part thereof (*m*); but it will not so direct if the dissolution is rendered necessary by the misconduct of the party paying the premium (*n*), or if the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium (*o*).

Rights of creditors in dissolution.

3. On the dissolution of a partnership the existing creditors of the firm of course retain all their rights against the partners which have already accrued.

Where a person deals with a firm, after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change. An advertisement in the *London Gazette* (or for Ireland in the *Dublin Gazette*) is notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised (*p*). The estate of a partner who dies or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to have been a partner, retires from the firm, is not liable for partnership debts contracted after the death, bankruptcy or retirement respectively (*q*).

After the dissolution of a partnership the authority of each partner to bind the firm and the other rights and obligations of the partners continue, notwithstanding the dissolution, so far as may be necessary to wind up the

(*l*) *Lyon* v. *Tweddle*, 17 Ch. D. 529; 50 L. J. Ch. 571.

(*m*) *Atwood* v. *Maude*, 3 Ch. 369; *Wilson* v. *Johnstone*, 16 Eq. 606.

(*n*) S. 40 of the Act; *Black* v. *Capstick*, 12 Ch. D. 863.

(*o*) S. 40, *sup.*; *Edmonds* v. *Robinson*, 29 Ch. D. 170.

(*p*) S. 36 of the Act; *Exp. Robinson*, 3 D. & Ch. 388.

(*q*) *Ibid.* See *Court* v. *Berlin*, (1897) 2 Q. B. 396; 66 L. J. Q. B. 714.

affairs of the partnership, and to complete the transactions begun but unfinished at the time of the dissolution, but not otherwise; provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt (*r*).

Where a dissolution has taken place, an account will not only be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership business and sell the partnership property, so that a final distribution may be made of the partnership effects (*s*). But a manager or receiver will not generally be appointed except with a view to a dissolution (*t*).

(*r*) S. 38 of the Act; *Lewis* v. *Reilly*, 1 Q. B. 349; *Butchart* v. *Dresser*, 4 De G. M. & G. 542.

(*s*) Story, 672.

(*t*) *Hall* v. *H.*, 3 Mac. & G. 79; *Taylor* v. *Neate*, 39 Ch. D. 538; 57 L. J. Ch. 1044.

CHAPTER IV.

THE LAW OF COMPANIES.

I. *Corporate Associations, their Development and Constitution.*

II. *Important Principles of Law affecting Companies.*

On account of the practical importance of the subject to students intending to practise at the Chancery Bar, and to the equity draftsman and conveyancer, it has been thought advisable to introduce what is a new feature in a text-book of equity, in the form of a Chapter upon the Modern Law of Joint Stock Companies, the principles of which law are, to a great extent, distinctively equitable principles, and the administration of which has been specially assigned to the Chancery Division (*a*).

In order to present the subject in the most intelligible form, it has been thought convenient: *first*, to give a brief outline of the development and constitution of companies and corporate associations generally; and, *secondly*, to introduce the student to the more detailed principles of law applicable to the modern joint stock companies.

(*a*) That is, to what was the High Court of Chancery, by the Companies Act, 1862, s. 82.

I. *Corporate Associations, their Development and Constitution.*

Corporations are artificial or constructive legal personages, the use and chief characteristic of which is that they have, as Blackstone says, "a kind of legal immortality," preserving their identity through a perpetual succession of natural persons (*b*), and, though composed from time to time of different individuals, continuing as a corporation to be called by the same name.

Corporations defined.

They are either (1) corporations sole, consisting only of one person, such as a bishop, a parson, or the Chamberlain of London; or (2) corporations aggregate, composed of several persons, and performing all important legal acts by means of their common seal (*c*).

Corporations: (1) Sole; (2) Aggregate.

Corporations of the latter class, of which we have now to speak, were originally created either by charter granted by royal letters patent or by Act of Parliament; and until 1845 all joint stock companies which had not obtained this expensive sanction were, in fact, merely private partnerships on an extended scale.

Corporations aggregate. Companies incorporated by Act or charter.

"Public" associations, the objects of which involved an interference with public or private vested interests, such, for instance, as the compulsory purchase of land for the purposes of making railways, always required, it is hardly necessary to say, the authorization of the Crown or of the Legislature, and still require the latter. But their constitution was usually a complex and elaborate matter, until, in the year 1845, an Act (since amended) was passed, providing both for the incorporation of all public joint stock companies (*d*), and also for a uniformity in the mechanism and constitution of companies so incorporated.

The Clauses Consolidation Acts.

(*b*) See Williams' Personal Property.

(*c*) See Bacon's Abridgment, tit. Corporations.

(*d*) Stats. 7 & 8 Vict. cc. 110 and 113, both now repealed by the Companies Act, 1862.

With this object, the clauses and provisions which it was usually found necessary to insert in the various Acts of Parliament by which companies were constituted for the carrying out of various public undertakings, such as the making of railways, harbours, and docks, the supplying of water, the cleansing and lighting of towns, &c., have been "consolidated," as it is called, in general Acts dealing with each of these various matters; and it is provided that the clauses and provisions of these general Acts, save so far as they shall be expressly varied or excluded by any special Acts, shall apply to every undertaking which shall thereafter be authorized by Parliament for any of the purposes above referred to (*e*). By this means the length of the Acts of Parliament required to constitute a company for any of the above-mentioned objects was greatly diminished.

Again, in the case of joint stock companies which had not been incorporated by either of the aforesaid methods, and which therefore, as we have said, remained mere partnerships, considerable inconvenience was experienced wherever it became necessary for the company to sue a shareholder, owing to the technical difficulty of a plaintiff *suing himself* (*f*). In order to remove this disability various enactments were passed, the most important being the Joint Stock Companies Registration Act, 1845 (*g*). The regulation of joint stock banks was provided for by a special Act of the same year (*h*). The bankruptcy of joint stock companies was provided for by the Joint Stock Companies Winding-up Act of 1848 (*i*); and the principle of "limited liability" was introduced by an Act of 1855 (*k*).

(*e*) The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), amended by the Companies Clauses Acts, 1863 and 1869 (26 & 27 Vict. c. 118; 32 & 33 Vict. c. 48). The other statutes dealing with various public undertakings have similar titles. The Tramways Act, 1870, was passed to facilitate the construction and regulate the working of tramways (33 & 34 Vict. c. 78).

(*f*) See the chapter upon Partnership, p. 609, *sup.*

(*g*) 7 & 8 Vict. c. 110.

(*h*) *Ibid.* c. 113.

(*i*) 11 & 12 Vict. c. 45.

(*k*) 18 & 19 Vict. c. 133.

All the above statutes, the dates of which sufficiently indicate the recent development of this branch of the law, *have now been either repealed by or consolidated in the Companies Act of* 1862 (*l*), which as amended by several statutes, hereinafter referred to, now regulate the whole law upon the subject.

Companies Acts, 1862 and 1867.

Under these Acts seven or more persons associated for any lawful purpose may, by subscribing their names to a "memorandum of association," and otherwise complying with the requisitions of the Acts in respect of registration, form themselves into an incorporated company with or without limited liability (*m*). No banking partnership composed of less than ten persons may carry on business, unless it be either registered under these Acts or authorised by some other Act of Parliament or letters patent; and the same provision applies to all partnerships of more than twenty persons having for their object the acquisition of gain (*n*), except companies engaged in working mines under the jurisdiction of the Stannaries (*o*). Companies incorporated under the Companies Acts, but not formed for the purpose of profit, are in many respects distinguishable from trading companies, but the details of principle and procedure which especially concern them cannot be here discussed (*p*).

If seven persons subscribe the memorandum of association, there can be no objection to its constitution on the ground that one of them may, by reason of his preponderant interest, dominate and control the company (*q*).

Limited liability.

The liability of the shareholders of a company formed under the Act of 1862, may, according to the memorandum of association, be limited either to the amount unpaid upon

(*l*) 25 & 26 Vict. c. 89.
(*m*) C. A. 1862, s. 6.
(*n*) *Ibid.* See *Shaw* v. *Benson*, 11 Q. B. D. 563; 52 L. J. Q. B. 575.
(*o*) C. A. 1862, s. 4.
(*p*) See *Re Bristol Athenæum*, 43 Ch. D. 236; 59 L. J. Ch. 116; *Figgins* v. *Baghino*, (1898) 2 Ch. 72; 67 L. J. Ch. 411; *Clegg* v. *Ellison*, (1898) 2 Ch. 83; 67 L. J. Ch. 504; 17 & 18 Vict. c. 112.
(*q*) *Salomon* v. *S. & Co.*, (1897) App. Cas. 22; 66 L. J. Ch. 35.

the shares respectively held by them, or to the amount which they agree severally to contribute in the event of the company being wound up, that is to say, either by shares or, as it is called, by guarantee (*r*); and under the Companies Act of 1867 (*s*), the liability of the directors or managers of a limited company may, if so provided by the memorandum of association or fixed by special resolution, be unlimited.

Liability of directors.

In respect of their liability, limited or unlimited, as members of the company, the shareholders are spoken of as contributories.

Companies Act, 1879.

By a statute passed in 1879 in consequence of the collapse of the Glasgow Bank in the preceding year, a company already registered with unlimited, may register again with limited liability.

The memorandum of association.

The memorandum of association is the written constitution of the company. It must state the name of the company, the objects for which it is formed, the amount of its capital, and the locality in which its registered office is to be situated (*t*), and if the fact be so, that the liability of members is limited. The memorandum must be stamped as if it were a deed, and must be signed by each of the seven or more subscribers and witnessed. It must next be registered at the office of the registrar-general of joint stock companies, and when registered it is binding upon the company as a corporation, and upon each and all of the several members (*u*). A statutory declaration by a solicitor engaged in the formation of the company, or by a person named in the articles of association as director or secretary of the company, of compliance with all or any of the Companies Acts must be produced to the registrar (*x*). On the registrar giving a certificate of incorporation, the incorporation of the company takes effect as from

Effect of registration.

(*r*) C. A. 1862, ss. 7, 9.
(*s*) 30 & 31 Vict. c. 131.
(*t*) C. A. 1862, ss. 39, 41, 43, 44.
(*u*) *Ibid.* s. 11.
(*x*) 63 & 64 Vict. c. 48, s. 1. This statute is concisely referred to hereafter in this chapter as "The Act of 1900."

the date thereof (*y*). As a general rule no alteration can be made, save with the sanction of the Court, of the conditions contained in the memorandum of association. But any company limited by shares is empowered to increase its capital, to convert into stock (*z*), or, by special resolution, with leave of the Court, to sub-divide (*a*) its existing shares as fixed by the memorandum of association.

Articles of association. "Ultra vires."

The memorandum may in the case of a company limited by shares, and must in the case of a company unlimited or limited by guarantee, be accompanied by *articles of association* prescribing the regulations agreed upon for the management of the company, any infringement of which, and still more any breach of the provisions of the memorandum of association is said to be an act "*ultra vires*" of the directors, or of the company, as the case may be. Appended to the Companies Act is a set of such articles (*b*), which may be adopted "*en bloc*," and which frequently form the basis of the articles of companies incorporated under the Act. The regulations and provisions contained in this table apply, in so far as they are not modified or excluded by the articles (*c*), to all companies limited by shares (*d*). The articles must be printed, stamped, signed, and attested in the same manner as the memorandum (*e*), and be registered with it (*f*); upon which the company, with all its rights and capacities, is legally complete. The articles are, in effect, bye-laws for the regulation of the internal affairs of the company, subject nevertheless to the memorandum and to the statutory and other rights of members (*g*).

(*y*) Act of 1900, s. 1. This provision removes difficulties as to the effectualness of incorporation which arose in *National Debenture, &c. Corp.*, (1891) 2 Ch. 505; 60 L. J. Ch. 533; and *Re Laxon & Co.*, (1892) 3 Ch. 555; 61 L. J. Ch. 667.

(*z*) C. A. 1862, s. 12; Act of 1900, s. 27.

(*a*) C. A. 1867, ss. 9—20, and C. A. 1877.

(*b*) C. A. 1862, Sched. I. Table A.

(*c*) C. A. 1862, s. 50.

(*d*) *Ibid.* s. 15.

(*e*) *Ibid.* s. 16.

(*f*) *Ibid.* s. 17.

(*g*) See *Re Peveril Gold Mines*, (1898) 1 Ch. 122; 67 L. J. Ch. 77, as to the right to petition for winding up; *Baring-Gould* v. *Sharpington*, (1899) 2 Ch. 80; 68 L. J. Ch. 429; *Payne* v. *Cork Co.*, (1900) 1 Ch. 308; *Allen* v. *Gold Reefs*, (1900) 1 Ch. 656; 69 L. J. Ch. 266.

It is to be observed, however, that companies formed for objects not involving the acquisition of gain, either by the company collectively, or by individual members, remain under the peculiar disability of not being able, without the sanction of the *Board of Trade*, to hold more than two acres of land.

The regulations contained in the articles of association, or in "Table A," may, subject to the provisions of the Act, *and to the conditions contained in the memorandum of association*, be altered or modified by special resolution (*h*), *i.e.*, by a resolution passed by a majority of not less than three-fourths of the existing members. And the company cannot deprive itself of this power of alteration either by a provision to that intent in the articles themselves or by contract (*i*).

Shares and stock.

The capital of every company is represented by a certain amount of stock, or a certain quantity of shares, each having a certain number affixed to it in the books of the company. The difference between the two is merely a formal one. In the latter case the whole capital is regarded as sub-divided into certain fixed amounts of, *e.g.*, five, ten, or one hundred pounds, whereas in the former case it is not. Thus, although one hundred pounds stock in the one case, and a single share in the other are the units adopted, for convenience sake, in estimating their market value, stock may be transferred in fractional parts, as well as multiples, of one hundred pounds, whereas fractions of shares are not recognised. A company limited by guarantee may not in future divide its capital into shares unless the memorandum of association so provides, and states the amount of capital and its mode of division (*k*). In the case of companies constituted under the Acts, both shares and stock are alike personal property (*l*).

(*h*) C. A. 1862, ss. 51, 53, 54.

(*i*) *Walker* v. *London Tramways Co.*, 12 Ch. D. 705; *Malleson* v. *National Insce. Co.*, (1894) 1 Ch. 200; 63 L. J. Ch. 206.

(*k*) C. A. 1900, s. 27.

(*l*) C. A. 1862, s. 22.

The register of members.

Every company is bound to keep a register (*m*) in which the names of its members, that is, of the proprietors of its stock or shares, must be entered. The person whose name is so entered, and that person only, will be recognised as the owner of the stock or shares standing in his or her name; for *no notice of any trust, express or implied, or constructive, is allowed to appear upon the register* (*n*). That is to say, that if the person whose name appears upon the register be in fact a trustee, he will (though this of course does not affect his duties to his *cestui que trust*) be regarded, as between himself and the company, as holding the stock or shares "in his own right." Every company must also have a registered office, and file returns showing its situation (*o*), and must register the names of its members and the number of shares held by them, and also the names of its directors, fourteen days after each annual general meeting (*p*).

Certificate of shares or stock.

Every shareholder receives a certificate under the common seal of the company, specifying the stock or shares held by him; and this document is *primâ facie* evidence of his title thereto. It must be produced and handed over upon the occasion of a transfer of the property, which is usually effected by a deed registered at the company's office. A new certificate is then made out for the new proprietor. But by the Companies Act of 1867 it is provided (*q*) that with respect to shares fully paid up, or to stock, *share warrants* may be issued entitling the bearer to the shares or stock therein specified, which accordingly become transferable by mere delivery of the warrant.

"Winding-up."

It is most commonly in connexion with the insolvency of a company, and the questions thereupon arising between the corporation and its contributories, that its affairs become the subject of judicial investigation. By the Act of 1862, provision is specially made for what is called the "winding-

(*m*) C. A. 1862, s. 25.
(*n*) *Ibid.* s. 30.
(*o*) *Ibid.* ss. 39, 40.
(*p*) *Ibid.* ss. 26, 27; C. A. 1900, s. 19.
(*q*) C. A. 1867, ss. 27—33.

Compulsory or voluntary.

up" of the affairs of companies either by the Court or of its own accord (*r*); that is, either compulsorily, upon the petition, for example, of a creditor—a process similar to the adjudication of bankruptcy in the case of an individual—or voluntarily on the resolution of the company itself to that effect. In the latter case the Court may make an order that the winding-up be continued under the supervision of the Court (*s*). The advantages of a supervision order have been found to be so problematical that such orders are now less frequently sought, and less easily obtained, than formerly.

Appointment of liquidator.

The business of the "winding-up," that is, the conclusion of the company's transactions, and the calling in and realisation of its assets, is, in the case of a voluntary winding-up, intrusted to an official appointed for the purpose, who is styled a liquidator (*t*). In the case of a compulsory winding-up, the effect of the order is to appoint the official receiver, in companies' winding-up, provisional liquidator. The creditors and contributories may in meeting either declare their desire that the official receiver may be continued as liquidator, or may nominate another person as liquidator; and the Court usually, but not necessarily, gives effect to the wishes of the meeting.

Liability of members past and present.

The liability of the members of the company in the "winding-up" is regulated upon the principles which have been already laid down, and such liability is of the nature of a specialty debt. Existing members are of course primarily liable; but if the Court be satisfied that they will be unable to satisfy the contributions required from them, then all persons who have been members of the company within a period of one year from the date of the winding-up, are held liable, to the extent of the amount unpaid on their shares, for the debts and liabilities contracted by the company during the period of their membership (*u*).

Winding-up of unregis-

It is also to be noticed that *unregistered* companies,

(*r*) C. A. 1862, ss. 79—128.
(*s*) *Ibid.* ss. 147, 148.
(*t*) *Ibid.* ss. 92, 97, and 133—144.
(*u*) *Ibid.* s. 38, sub-ss. 1—7.

that is, partnerships and other associations (except railway companies incorporated by Act of Parliament), consisting of more than seven members, may be compulsorily wound up in the same manner as registered companies (*x*). tered companies.

Thus, industrial and provident societies (*y*), friendly societies, building societies (*z*), and other similar institutions, may be wound up under this Act; such business being specially assigned to the equitable jurisdiction of the County Court. Life assurance companies are governed by the Life Assurance Companies Act, 1870 (*a*). Friendly and industrial societies, &c.

A foreign or colonial company carrying on business in England, may be wound up under the section of the Act dealing with unregistered companies (*b*), but not if its business be merely carried on by agents (*c*). Foreign companies.

II. *Important Principles of Law affecting modern Joint Stock Companies.*

The student who has followed the above brief outline of the development, constitution, and principal incidents of a joint stock company, will now be prepared for a somewhat fuller discussion of the legal questions most commonly arising in relation to its internal management, and the rights and liabilities of the various parties concerned therein.

A corporation at common law has been defined above as a "legal personage," and the same definition may be correctly applied in particular to the modern company. But Nature of a modern company.

(*x*) C. A. 1862, s. 199.

(*y*) See Industrial and Provident Societies Acts (39 & 40 Vict. c. 45, s. 17; 56 & 57 Vict. c. 39).

(*z*) Building Societies Acts (37 & 38 Vict. c. 42, s. 32; 57 & 58 Vict. c. 47).

(*a*) 33 & 34 Vict. c. 61.

(*b*) Companies Act, 1862, s. 199; *In re Matheson Brothers*, 27 Ch. D. 225.

(*c*) *In re Lloyd Générale Italiano*, 29 Ch. D. 219.

the term must not be taken to describe exhaustively the peculiar characteristics of an institution which is essentially the creature of statute. A joint stock company, for the purposes for which it has been called into existence, acts by the determinations of the "domestic tribunal" constituted within it (*d*), that is, by the resolutions passed by a majority of its members, and carried out by its servants and agents, with all the rights and capacities of an individual. Thus, to the external world the company presents the appearance of a single *persona*—that *persona* being *the shareholders viewed in the mass*. But it is most important to remember that each individual shareholder may, in his private capacity, appear *pro tempore* as an outsider, merely connected with the company by some contractual obligation, and assert his private rights against the rest of the shareholders. Nor must it be supposed that in all cases a "majority" of the latter can be taken to represent the "company," or will be allowed the absolute control of its affairs; for although, of course, owing to the very nature of a corporate institution, this must as a rule be the case, the Court will interfere to protect a minority whose rights are being unfairly overridden (*e*), on the application of one of their number. Again, the student must distinguish the right of an individual, or of several individuals (such as, for instance, a minority in the case just mentioned), against the company collectively, from the rights of the same persons as members of the company against the directors or promoters of the company personally. Again, the directors may be liable in several ways: either *to the company*, (1) as agents who exceed the powers intrusted to them, as in the case of an "*ultra vires*" act on their part; or (2) in their fiduciary relation, as trustees or quasi-trustees for the shareholders collectively; or, again, *to the individual shareholder*, or even to strangers, when they have been guilty of fraud or mis-

Its internal and external relations.

(*d*) *In re Suburban Hotel Co.*, L. R. 2 Ch. 737; followed in *Re Langham Skating Rink Co.*, 5 Ch. Div. 669.

(*e*) *Menier* v. *Hooper's Telegraph Works*, 9 Ch. 350.

representation by which their interests have been injuriously affected. On the other hand, it must be remembered that, with regard to the outside public, the acts of the directors, if within the scope of their authority, will bind their principals, so that the liability of the directors will in such cases be often only another word for the liability of the company and of the shareholders generally.

Scope of the following chapter.

In dealing with so large a subject, every effort has been made to leave out of sight questions such, for instance, as those relating to the formal organization of the company, or to practice and procedure, to which a mere reference to the statutes generally provides an adequate answer, and to discuss principally those to which distinctively legal or equitable doctrines, acting in many cases conjointly with the provisions of statute law, have to be applied. The utmost that can be attained in so small a space will be to leave the student in possession of the main principles governing cases of the latter class, and by references to a careful selection of important modern decisions, to put him in the way of acquiring that fuller knowledge of the subject which will enable him to deal with questions of a more complicated or more exceptional nature. It has been found convenient, without adopting any particular order beyond that suggested by the subject itself, to divide it into the following heads, viz. :—

1. *The Liabilities of "Promoters" of Companies.*
2. *The "Prospectus" of the Company; and the effect of Misrepresentations contained in it.*
3. *The Doctrine of* "Ultra Vires."
4. *Allotment and Acceptance of Shares.*
5. *The Transfer, Forfeiture, &c. of Shares.*
6. *The payment of Dividends.*
7. *Directors—their Duties and Liabilities.*
8. *The "Winding-up" of Companies.*

1. *The Liabilities of Promoters.*

Who are promoters.

Persons who exert themselves for the purpose of forming and floating a company, are said, in legal phraseology, to "promote" it. The meaning of the term is hardly capable of exact definition; indeed the Court has been careful to abstain from definition (*f*); but it may be taken to include all the acts and transactions usually involved in "floating" the company, that is, in securing the subscription of the shares which are to constitute its capital (*g*), or, for example, the purchasing of property, followed by the creation of a company to which it is intended to be sold. All persons who, in performing such acts, place themselves in a certain relation to the company, are held to be its "promoters," and as such to be in a fiduciary relation towards it (*h*). It is possible for a vendor not to assume such a relation, but to keep the company, as it is said, "at arms' length." Not every vendor, therefore, is a promoter. This is a principle both well established and easily intelligible; for all the arguments which would apply as between trustee and *cestui que trust*, or between principal and agent, are *à fortiori*, applicable to the peculiar case of the promoter who selects, and, in fact, *creates*, *his own cestui que trust* or principal, since the company has no choice as to who should call it into existence. Thus, any concealment of material facts in relation to the property purchased by the company, and any *secret profits* made by the promoter upon the sale, much more any actual fraud on his part, will afford grounds on which the company may obtain a rescission of the transaction, or an order against the promoter to refund his improper gains; the company being entitled to appro-

Their duties and liabilities.

(*f*) *Whaley Bridge Co.* v. *Green*, 5 Q. B. D. 109.

(*g*) *Emma Silver Mining Co.* v. *Lewis*, 4 C. P. D. 396; *Erlanger* v. *New Sombrero, &c. Co.*, 3 App. C. 1218.

(*h*) *Erlanger* v. *New Sombrero, &c. Co.*, *sup.*; *Bagnall* v. *Carlton*, 6 Ch. D. 371.

priate to itself all advantages and profits obtained by the promoter without its knowledge in the formation of the company (*i*) When a company is in liquidation, a promoter is liable to public examination and also to the remedies provided for misfeasance by sect. 10 of the Companies Act, 1890.

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2. *The Prospectus—Misrepresentation.*

The pro-spectus.

The first step which directly concerns the public in the formation of a company is the issue of a prospectus, a printed notice announcing the nature, object, and the prospects of the company. The alleged misrepresentation of facts in this document is a frequent subject of litigation.

Suppression of contracts. Companies Act, 1867.

The Companies Act of 1900 contains stringent provisions designed for the prevention of abuses disclosed in many cases which came before the Courts. Prior thereto, the only statutory requirement was that the dates of and parties to all contracts entered into by the company, or its directors, promoters, or trustees at the date of the issue of the prospectus, should be fully stated therein, and that such omission would, *ipso facto*, give each of the shareholders a right of action against the authors of the prospectus personally, but it gave no remedy against the company (*k*). This section still governs cases arising on prospectuses issued before January 1st, 1901.

Misrepresentation.

But this special "statutory" fraud did not diminish the general rights of the individual or of the corporation upon the common law ground of deceit and misrepresentation. It suffices to say that a prospectus is in this respect like

(*i*) See *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, (1899) 2 Ch. 392; 68 L. J. Ch. 699; *Olympia, Lim.*, (1898) 2 Ch. 149; 67 L. J. Ch. 433; *Gluckstein* v. *Barnes*, (1900) App. C. 240; 69 L. J. Ch. 385.

(*k*) Companies Act, 1867, s. 38.

any other representation made by one party to another. If the statements therein contained be false in any material point, and the plaintiff in reliance upon them has contracted an obligation, or in any way acted to his own detriment, he can either rescind his agreement to take shares (provided that the relief is sought before the company goes into liquidation), or he may recover damages from the authors of the misrepresentation (*l*).

"Actual" fraud.

The plaintiff is not bound to prove that the misrepresentation was made with any actual fraudulent intent (*m*), although this will sometimes be implied in the case of reckless assertions of facts which would be material; but, on the other hand, he must show that he has suffered injury; and unless he can show that he was deceived by it, it will be useless for him to prove any amount of fraud on the part of the defendants. The limitations of the plaintiff's right in this respect were clearly laid down by the House of Lords in the case of *Smith* v. *Chadwick* (*n*), in which it was held, that where the representations contained in a prospectus were capable of more than one interpretation, it was for the plaintiff to say what construction he put upon them; nor would it be enough for him to show that the statements were inaccurate and, generally speaking, of a misleading character, unless he himself was in fact misled by them. And if, either by reason of his private knowledge of the matter, or for any other reason, he individually was not so misled, the fact that other persons in his position *very well might have been*, will be totally immaterial. The Court will not, it was expressly said, allow a plaintiff who has in fact been a party to a speculation, "to convert his speculations into certainties at the expense of other people" (*o*).

Plaintiff must have been deceived.

Smith v. *Chadwick*.

(*l*) *Arkwright* v. *Newbold*, 17 Ch. D. 301; cf. *Derry* v. *Peek*, 14 App. C. 337; 58 L. J. Ch. 864; *supra*, p. 169; *Re Metal Constituents*, (1902) 1 Ch. 707.

(*m*) *Smith* v. *Land and House Property Corporation*, 28 Ch. D. 7.

(*n*) 9 App. C. 187; 52 L. J. Ch. 873.

(*o*) *Smith* v. *Chadwick*, 29 Ch. D. 459, *per* Jessel, M.R.

The Companies Act of 1900, sects. 9 to 11, deals very fully with prospectuses issued by companies within the purview of the Act—that is to say, companies registered under the Companies' Acts. It must suffice here to summarise its chief provisions very briefly :—

1. First observe that a prospectus is so defined as to include any notice, circular, advertisement or other invitation offering to the public for subscription or purchase any shares or debentures of a company.
2. Every such prospectus must be dated, and unless the contrary be proved the date thereon shall be taken to be the date of its publication.
3. It must be signed by every person named therein as a director or proposed director, or by his agent authorized in writing.
4. It must be filed with the Registrar of Public Companies on or before its publication, and must state on the face of it that it has been so filed.
5. It must give the contents of the memorandum of association:
6. Must state the number of founders' or management shares (if any), and the nature and extent of the interest of the holders in the property and profits of the company :
7. Also the number of shares fixed as a director's qualification, and any provision as to the remuneration of directors, with their names, descriptions and addresses—that is, places of residence (*p*) :
8. The minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share :
9. The number and amount of shares and debentures issued or agreed to be issued as fully or partly paid up, and the consideration for such issue :
10. The names and addresses of the vendors of any

(*p*) *Stoy* v. *Rees*, 24 Q. B. D. 748 ; 59 L. J. Q. B. 310.

property purchased or acquired by the company or proposed to be so purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or whereof the purchase has not been completed at the date of the prospectus, and the amount payable to the vendor, or if there is more than one separate vendor, or the company is a sub-purchaser, the amount payable to each vendor:

11. The amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring subscription for shares (commonly known as underwriting):
12. The amount or estimated amount of preliminary expenses:
13. The dates of and parties to every material contract, and a reasonable time and place at which any such contract or a copy thereof may be inspected:
14. The names and addresses of the auditors (if any):
15. Full particulars of the nature and extent of the interest (if any) of every director in the promotion of or in the property proposed to be acquired by the company, with a statement of all sums paid or agreed to be paid to him in cash or shares by any person to qualify him as director or otherwise for services rendered in connection with the formation of the company.

The above enumeration of the statutory requirements is, on the one hand, not complete, and, on the other hand, is subject to certain exceptions restricting its generality; but it suffices to show that a stringent attempt has been made to check such frauds and abuses of confidence as have been presented in many recent and notorious cases of company promoting. How far the attempt will prove successful it is perhaps at present too soon to attempt to prognosticate.

3. *The Doctrine of* "Ultra Vires."

"*Ultra vires.*"

It has been laid down as a general principle of jurisprudence that the governing body of a corporation can only employ its funds for the purpose for which they were contributed (*q*). To employ them for any other purpose is said, in legal phraseology, to be "*ultra vires.*" But according to the law governing modern companies, an act or transaction may be "*ultra vires,*" and so illegal, in two ways—(1) as contrary to the memorandum of association of the company; (2) as contrary to the articles.

(1) Under the memorandum of association.

The memorandum must, as has been said, define *inter alia* the objects for which the company has been formed. The company has a legal existence only for the performance of those objects. Thus, in the leading case of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (*r*), where the directors of a company entered into a contract relating to the laying down and the working, by means of a foreign association formed for the purpose, of a foreign railway, which contract was held to be without the somewhat large powers conferred upon the company as manufacturers of railway carriages, plant, &c., and "general contractors," it was held that the contract, being of a nature not authorised by the memorandum of association, was "*ultra vires*" not only of the directors, but of the whole company, so that the subsequent assent even of the whole body of shareholders could not ratify it. The principle emphasised by this decision is one which it is important to keep in mind, namely, that a company created under the Act of 1862 has not the general common law rights of a corporation, but only those which are defined in the legal document from which it derives its existence. This—the memo-

Ashbury v. *Riche.*

(*q*) *Pickering* v. *Stephenson*, 14 Eq. 322.

(*r*) L. R. 7 H. L. 653; and see *London Financial Association* v. *Kelk*, 26 Ch. D. 107; 53 L. J. Ch. 1025; *Hawkes* v. *E. C. Ry. Co.*, 5 H. L. C. 348.

randum required by the Act (*s*)—is the "charter of the company," and its provisions can only be departed from in certain specified cases (*t*).

Of course, the memorandum cannot authorise the doing of any act forbidden by statute or contrary to law, as, for instance, the purchase by a company of its own shares (*u*); or a surrender of shares, which is tantamount to purchase (*uu*); or the issue of shares at a discount (*v*); or the payment of dividends out of capital (*x*). Moreover, if the memorandum purports to give wide powers to the company by the use of general words, such words will be construed, on the *ejusdem generis* principle, as being only ancillary to the objects specifically mentioned (*y*).

(2) Under the articles of association.

But the "articles of association," which are the more detailed regulations for the management and working of the company, are not of so sacred and unalterable a character as the "memorandum." Thus, a contract entered into by the directors of a company contrary to the provisions of its articles, though it is not *primâ facie* binding on the company (since it is a transaction exceeding the powers intrusted to them as agents of the corporation), may, if the assent be expressed with the natural formalities, be ratified by them, provided, of course, that, though contrary to the provisions of the articles of association, it is not contrary to those of the memorandum. Further, such ratification will be presumed where the shareholders are aware that the directors have exceeded their legal powers, and yet take no steps in the matter, but allow their conduct to remain unimpeached for years (*z*). Thus, the respective rights of the holders of preference and ordinary shares, if stated only in the articles, may be varied, subject to the

Ratification.

(*s*) C. A. 1862, s. 8.
(*t*) *Ibid.* s. 12.
(*u*) *Trevor* v. *Whitworth*, 12 App. C. 409; 57 L. J. Ch. 28.
(*uu*) *Bellerby* v. *Rowlands, &c.*, (1902) 2 Ch. 14.
(*v*) *Ooregum Gold Mining Co.* v. *Roper*, (1892) App. C. 125; 61 L. J. Ch. 337.
(*x*) *Verner* v. *General Inv. Co.*, (1894) 2 Ch. 239; 63 L. J. Ch. 456.
(*y*) *Re German Date Coffee Co.* (1882), 20 Ch. D. 169; 51 L. J. Ch. 564; *Stephens* v. *Mysore Reefs Co.*, (1902) 1 Ch. 745.
(*z*) *Houldsworth* v. *Evans*, L. R. 3 H. L. 263.

contractual rights of the parties (*a*). *Secus*, however, if these rights are stated or implied in the memorandum, even if every member consents (*b*).

Certain powers may, however, be implied though not expressly set out in either memorandum or articles, or may fall within a general clause authorising anything incidental or conducive to other objects of the company: for example, there is an implied power for a *trading company* to borrow money (*c*); but it is necessary to be very wary in resorting to powers on this general ground (*d*).

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4. *Allotment of Shares and Commencement of Business.*

Allotment.

The relation connecting the company and the shareholders arises upon the allotment and acceptance of shares. Where shares are allotted in the usual manner in answer to an application for the purpose, acceptance on the part of the applicant will generally be presumed unless he at once repudiates the shares assigned to him, with their attendant rights and liabilities. Upon the communication (*e*) to the applicant for shares of the allotment, there is *primâ facie* a binding contract on his part to take the number of shares specified. But the contract is, of course, governed by the common law doctrines on the subject of proposal and acceptance; and if the application for shares be a conditional offer, and the company, that is, the directors, do not accept the condition, they cannot compel the applicant to

Conditional offer to take shares.

(*a*) *Allen* v. *Gold Reefs, &c.*, (1900) 1 Ch. 656; 69 L. J. Ch. 266.

(*b*) *Ashbury* v. *Watson*, 30 Ch. D. 367; 54 L. J. Ch. 985. See also *Wenlock* v. *River Dee Co.*, 10 App. C. 354; 54 L. J. Q. B. 577.

(*c*) *General Auction, &c. Co.* v. *Smith*, (1891) 3 Ch. 432; 60 L. J. Ch. 723; contrast *Re Blackburn Benefit, &c. Soc.*, 22 Ch. D. 61; 52 L. J. Ch. 92.

(*d*) See *Ernest* v. *Nicholls*, 6 H. L. C. 401; *Re Peruvian Railways Co.*, 2 Ch. 617; *Tomkinson* v. *S. E. R.*, 56 L. T. 13.

(*e*) *I.e.*, on the posting of the letter of allotment: *In re Imperial Land Co. of Marseilles, Townsend's Case*, 13 Eq. 148.

accept the shares. Thus, if a tradesman or contractor offers to take 300 shares in a company on condition that certain business or a certain contract shall be given him (*f*), or that the subsequent calls upon the shares be set off against goods to be supplied by him (*g*), the contract will not be completed by the mere unconditional allotment to the applicant of the 300 shares; and should the directors put his name upon the register of members as a shareholder, he will be entitled to an order for its removal. And so in the converse case, where the allotment made in answer to an unconditional offer to take shares is coupled with a condition, the shareholder may be entitled to withdraw his application for shares (*h*); and an unreasonable delay in making the allotment will have the same effect (*i*).

Conditional allotment.

Moreover, after acceptance of the shares, an applicant who has been induced to become a shareholder by fraud of the directors will have a good defence to an action by them for the "calls" due upon his shares, if within reasonable time after the discovery of the fraud he has been careful to repudiate the shares together with all the rights, benefits, and liabilities that might accrue to him as a shareholder (*k*).

Fraud.

Until the passing of the Companies' Act, 1900, it was open to directors to go to allotment and commence business even though a very small portion of the capital offered for subscription was applied for, and disastrous results often ensued from the commencement of business with inadequate capital. One of the chief objects of the last-mentioned Act was to prevent such profligate proceedings, and by sect. 4 it is enacted that no allotment shall be made of any share capital of a company offered to the public for subscription unless (a) the amount (if any)

Conditions of allotment.

(*f*) *In re Aldborough Hotel Co., Simpson's Case*, 4 Ch. 184.

(*g*) *In re Rolling Stock Company of Ireland, Shackleford's Case*, 1 Ch. 567; and see *Hussey* v. *Horne-Payne*, 8 Ch. D. 678.

(*h*) *In re Warren's Blacking Co., Pentelow's Case*, 4 Ch. 178.

(*i*) *In re Bowron, Baily & Co., Baily's Case*, 3 Ch. 592.

(*k*) *Welch-y-Plwm Lead Mining Co.* v. *Baynes*, 2 Ex. 324.

fixed by the memorandum or articles of association and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment, or (b) if no amount is so fixed and named, then the whole amount of the share capital so offered for subscription has been subscribed, and the sum payable on application for shares has been received by the company. And the amount so fixed and named as aforesaid, or the whole amount (as the case may be) must be reckoned exclusively of any amount payable otherwise than in cash. The amount payable on application must not be less than 5 per cent. of the nominal amount of the share; and if these conditions are not complied with within forty days after the first issue of the prospectus, all money received from applicants for shares must be forthwith repaid to the applicants, without interest. Any condition requiring any applicant to waive the requirements of this section is void.

It must be observed that the above section only applies to companies which offer shares for subscription to the public. It has no application where shares are privately subscribed; and except as to the amount payable on application, it only applies to a first, not to a subsequent allotment.

Commencement of business.

The Act of 1900 also restricts the power of Companies which invite public subscription for shares to commence business. Sect. 6 provides that no such company registered after 31st December, 1900, shall commence business or exercise any borrowing powers unless (a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription (provided for in sect. 4), and (b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription, and (c) there has been filed with the registrar a statutory declaration by the secretary or one of the directors in a pre-

scribed form that these conditions have been complied with. On the filing of such a declaration the registrar will certify that the company is entitled to commence business, and such certificate is conclusive evidence that the conditions have been complied with.

The Act imposes severe penalties for contravention of these provisions.

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5. *Transfer, Forfeiture, &c. of Shares.*

Transfer.

The relation of "shareholder" in an existing company is generally extinguished, either entirely or *pro tanto*, by the assignment or transference of the whole or part of his shares by the holder to some other person, who thereupon becomes a member of the company in his place. The shareholder may, subject to the provisions of the articles of association, which in the cases of private companies often contain stringent restrictive clauses (*l*), sell and transfer his shares as he pleases, subject to whatever liability for calls attaches to them. The deed of transfer, however, must state the consideration and the name of the transferee, and

Registration.

must be registered at the company's office. The directors of the company are *primâ facie* bound to allow the registration of every *bonâ fide* transfer presented for the purpose, unless special powers to the contrary are conferred upon them (*m*). It is not unfrequently provided by the articles of association that transfers by shareholders who are indebted to the company shall be refused registration, unless the directors are satisfied of the responsibility of the transferee (*n*), and the Court will not allow such a provision to be evaded; *e.g.*, by a shareholder persuading the directors at a board meeting to postpone the "call" which

(*l*) See *Borland's Trustee* v. *Steel Brothers*, (1901) 1 Ch. 279; 70 L. J. Ch. 51.

(*m*) *In re Smith, Knight & Co.*, *Weston's Case*, 4 Ch. 20.

(*n*) *Exp. Stringer*, 9 Q. B. D. 436; see *Bradford Banking Co.* v. *Briggs & Co.*, 31 Ch. D. 19; 12 App. C. 29; 56 L. J. Ch. 364.

would make him the company's debtor, and then taking advantage of the postponement to transfer his shares to a pauper in order to escape liability. In such a case the Court declined to remove the fraudulent transferor's name from the register of members, and to substitute that of the transferee (*o*). And, generally, the Court will "rectify" the register (*p*), in the case of fraudulent transfers which have been completed and entered thereon, by restoring the name of the original holder and removing that of his transferee (*q*). In adjudicating upon these questions a Court of equity is not bound always to follow what a Court of law would do in such a case, but will act upon the equitable principles applicable to the particular case (*r*), and will not allow one member of the company, by a mere evasion of his own liabilities, to increase those of the other contributories past and present (*s*).

Rights of transferee.

It is to be observed that, in the common case of a transfer of shares by sale upon the Stock Exchange, there is no implied undertaking by the vendor that the transfer which he is prepared to execute will, when it is presented at the company's office, be registered; and in the event of the directors declining, for any valid reason, to register it, the transferee cannot maintain an action against the vendor for the price of the shares (*t*).

Forfeiture and surrender of shares.

The articles of a company very commonly provide that the shares of members are to be forfeited upon non-payment of calls, the amount already paid up upon them being thus confiscated for the benefit of the company generally. Such procedure, however, being penal, all the requirements of the articles relating thereto must be

(*o*) *In re National and Provincial Marine Insurance Co., Exp. Parker*, 2 Ch. 685; *Re Stockton Malleable Co.*, 2 Ch. D. 101.

(*p*) See Companies Act, 1862, s. 35.

(*q*) *In re Bank of Hindustan, China and Japan, Exp. Kintrea*, 5 Ch. 95.

(*r*) *In re National and Provincial Marine Insurance Co., Exp. Parker, sup.*

(*s*) For a discussion of these principles, see *In re Smith, Knight & Co., Hakim's Case*, 7 Ch. 296, note.

(*t*) *Stray* v. *Russell*, 1 E. & E. 888, 917; followed in *London Founders' Association* v. *Clarke*, 20 Q. B. D. 576.

Continuation of liability.

strictly observed (*u*). It might, perhaps, be expected that such forfeiture would *ipso facto* release them from all future liability as contributories in the event of the company being wound up; but it has been laid down in a variety of decisions that this is not necessarily so. For instance, where shareholders within a year before the winding-up transferred their shares, which were subsequently forfeited upon the transferees failing to pay the calls, the transferors were held liable, under the provision (*x*) which has been mentioned above, as past members (*y*); and it was expressly held in a later case that the liability of a "past member" of a company, being purely the creation of the Companies Acts, arises quite independently of the fact that his shares may have been transferred to another person or extinguished by forfeiture (*z*). But it must be remembered that no person can be put upon the list of contributories as a past member until it has been actually ascertained that the present members are unable to satisfy the contributions required from them (*a*); that is to say, the utmost which can in the winding-up be demanded from the whole body of shareholders, past and present, is the amount then remaining due upon the shares of existing members. This amount may be defrayed by the existing members; if not, the deficiency must be made good by the past members, if it does not exceed their statutory liability (*b*).

(*u*) See *Johnson* v. *Little's Iron Agency*, 5 Ch. D. 687; *Garden Gully Co.* v. *McLister*, 1 App. C. 39; *Bottomley's Case*, 16 Ch. D. 681.

(*x*) Companies Act, 1862, s. 38, sub-ss. 1—7.

(*y*) *In re Accidental and Marine Insurance Corporation, Re Bridger's Case*, 4 Ch. 266.

(*z*) *In re Blakely Ordnance Co., Creyke's Case*, 5 Ch. 63.

(*a*) *In re Blakely Ordnance Co., Needham's Case*, 4 Eq. 135.

(*b*) Under s. 38, sub-ss. 1, 2.

6. *The Payment of Dividends.*

"Profits."

The natural and proper fund out of which dividends are payable is obviously that which represents the profits earned by the company in the prosecution of its trade or business, but as to the exact meaning of the term "profits" question has frequently arisen.

What they are.

"Profits" may be defined, according to the best authority, as the amount by which the ordinary business receipts exceed the expenditure, or rather so much of the expenditure as is properly chargeable to revenue account (*c*). The meaning of this is, that in estimating the actual "net profits" for any given period, those losses which are properly chargeable to revenue account, *i.e.*, those arising from depreciation, wear and tear of capital, plant, &c., must be made good out of revenue before any "profits" can be said to have been earned, or at least before the amount of them can be ascertained. It is clear, in fact, that if the "profits" be estimated without allowing for such losses, and a dividend be paid, then such dividend is paid not out of true profits, but out of capital, since it diminishes the funds which should have been devoted to the making good of the capital. It is equally obvious that the repetition of such a process would ultimately result in leaving the company with no capital at all, and consequently incapable of earning "profits" in any sense.

Payment of dividends out of capital.

Illegal.

The payment of dividends out of capital is, therefore, illegal; nor can any provision in the memorandum or articles of association justify it (*d*), and if directors do make such payments they are liable to make good the amount (*e*). But if shareholders receive such dividends with knowledge of the facts, they can be compelled

(*c*) See Buckley on Companies, 7th ed., p. 554.

(*d*) *Verner* v. *General Investment Trust*, (1894) 2 Ch. 239, 264; 63 L. J. Ch. 456; *Re Sharpe*, (1892) 1 Ch. 154; 61 L. J. Ch. 193.

(*e*) *Re National Bank of Wales*, (1899) 2 Ch. 629; 68 L. J. Ch. 634.

to repay the sums received, and have no claim on the directors (*f*).

It must be noted, however, that a company which is engaged in working a wasting property, such as a mine or a patent, is not necessarily compelled to maintain its capital intact by providing a sinking fund to avoid its exhaustion (*g*), nor is it bound to take into account a depreciation of permanent investments. Each case must be considered on its own merits; and at any rate "circulating capital" must be maintained (*h*).

Debenture capital.

But "share capital" must be distinguished in this respect from "debenture capital," that is, moneys raised by borrowing upon the security of the company's bonds. It does not follow that the payment of dividends out of the latter would be illegal. "Debenture capital" is not, in fact, capital at all, in the proper sense of the word. It is available money raised by borrowing.

Injunction.

The improper payment of a dividend, like any other act of the company which is "*ultra vires*," will be restrained by injunction on an application by any of the shareholders of the company (*i*); but a mere simple contract creditor cannot maintain such a suit upon the ground that the fund for payment of his debt is thereby diminished.

Payment "in proportion to shares."

In the absence of any provision to the contrary, the members are entitled to the profits "in proportion to their shares" in the company; in fact, these are the words commonly employed in the articles of association. In accordance with an important decision (*k*), the phrase "in proportion to their shares" must be taken to mean "in proportion to the nominal value of their shares," irrespec-

(*f*) *Moxham* v. *Grant*, (1900) 1 Q. B. 88; 69 L. J. Q. B. 97.

(*g*) *Lee* v. *Neuchatel Asphalte Co.*, 41 Ch. D. 1; 58 L. J. Ch. 408; *Verner* v. *General Investment Trust*, (1894) 2 Ch. 239; 63 L. J. Ch. 456.

(*h*) *Bond* v. *Barrow Hæmatite Steel Co.*, (1902) 1 Ch. 353.

(*i*) *Hoole* v. *Great Western Rail. Co.*, 3 Ch. 262.

(*k*) *Oakbank Oil Co.* v. *Crum*, 8 App. C. 65.

tively of what amount has been in each case paid up upon them.

"Preference" shares.

But a company may be empowered by its articles to (or may by special resolution) issue preference shares, unless forbidden by the memorandum so to do (*l*). In such a case, if the profits of any one year are insufficient to pay the preference shareholders the dividend to which they are, under the articles of association, entitled, the deficiency may, as between them and the *ordinary* shareholders, be made good, at the expense of the latter, out of subsequent profits (*m*). *Secus*, however, if the provision is that they are entitled to a preferential dividend out of the profits *of each year* (*n*). The right to a preferential dividend does not, in the absence of a stipulation to this effect, involve a preferential right to return of capital (*o*).

Sale of shares.

In the case of a sale and transfer of shares, all dividends declared after the completion of the contract, although they represent the earnings and are declared in respect of a period antecedent to the sale, belong to the purchaser (*p*).

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7. *Directors—Their Duties and Liabilities.*

Position of directors.

Directors are the superior officials of the corporation which they represent. Their position is that of agents of the company (*q*), whose powers are determined by the articles of association. They are the "managing partners" (*r*) of the latter.

(*l*) *Andrews* v. *Gas Meter Co.*, (1897) 1 Ch. 361; 66 L. J. Ch. 246; *Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656; 69 L. J. Ch. 266.

(*m*) *Webb* v. *Earle*, 20 Eq. 556.

(*n*) *Staples* v. *Eastman Co.*, (1896) 2 Ch. 303; 65 L. J. Ch. 682.

(*o*) *Re Driffield Gas Light Co.*, (1898) 1 Ch. 451; 67 L. J. Ch. 247.

(*p*) *Black* v. *Homersham*, 4 Ex. D. 24.

(*q*) *Charitable Corporation* v. *Sutton* (1742), 2 Atk. 400.

(*r*) *Re Forest of Dean Coal Co.*, 10 Ch. Div. 450, 451.

Their powers.

They have power to bind the company by any acts the object of which is not "*ultra vires*" of the company: that is to say, the scope of their employment as agents extends to all transactions upon which the company itself is authorised to enter; save and except such powers as are required by statute or the articles to be exercised only by the company in general meeting. The general authority of directors is held to cover all such acts as are reasonably necessary to the proper management of a business (*s*).

Their liability.

The directors, however, have a double character. They are, as has been said, agents for the company, and in this respect their liability is, of course, to be determined by the law of Principal and Agent. Directors cannot therefore be made personally liable on a contract entered into on behalf of the company (*t*).

"As trustees" of their powers.

As has already been seen, agents hold a fiduciary position with respect to their principals, and thus directors are in some degree trustees for the company of the powers committed to them (*u*). Beyond their authorised remuneration, they may not make a profit out of their office, as for example by allotting to themselves shares which command a premium (*v*). In such an event any profit made will belong to the company (*x*). But provision may lawfully be made by the articles for a director to deal with the company and to retain profits thus made. In such cases there must be full disclosure of the facts either to the company, or at least, if the articles so provide, to the co-directors (*y*).

Where also "promotion money" was, upon the first allotment of shares, to be paid to the promoters, and the

(*s*) See, *e.g.*, *Re West of England Bank, Exp. Booker*, 14 Ch. D. 317; *Re Patent File Co.*, 6 Ch. 13.

(*t*) *Ferguson* v. *Wilson*, 2 Ch. 77.

(*u*) See remarks of James, L. J., in *Smith* v. *Anderson*, 15 Ch. D. 247, 275.

(*v*) *York* v. *N. Midland Ry. Co.*, 16 Beav. 485.

(*x*) *Shaw* v. *Holland*, (1900) 2 Ch. 305; 69 L. J. Ch. 621.

(*y*) *Dunne* v. *English*, 18 Eq. 524; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. C. 1218; *Gluckstein* v. *Barnes*, (1900) App. C. 240; 69 L. J. Ch. 385.

directors prematurely allotted shares, and paid £5,000 to the promoters, who immediately paid to the directors £500 apiece, in the winding-up of the company re-payment of that £500 was ordered from each of the directors (*z*). But it must not be inferred from the fact of their holding a fiduciary position that all the doctrines relating to trustee and *cestui que trust* apply (*a*).

It has been already said that where the shareholders are aware that the directors are exceeding their legal powers, and take no steps in the matter, they will be taken to have sanctioned what has been done: yet in order to establish this presumption, evidence of knowledge, or of the means of knowledge of the facts, must be brought home to each individual shareholder: and *it is no part of the shareholder's duty to look personally into the management of the business.* He is entitled to assume that the directors to whom such management has been entrusted are conducting it properly (*b*). *A fortiori* the same principle applies in the case of strangers dealing with the company (*c*), who, however, will not be protected if acting with actual or constructive notice of any irregularity (*d*).

For fraudulent acts.

It is hardly necessary to say that the directors are liable for their own fraudulent acts; and the company will not be bound by a fraudulent and illegal agreement entered into by the directors on its behalf (*e*). But the case may be different where, *e.g.*, the fraudulent act or misrepresentation has been made upon the company's behalf (*f*), and has induced a third party to contract with the company.

(*z*) *Madrid Bank* v. *Pelly*, L. R. 7 Eq. 442.

(*a*) See *Re Faure Accumulator Co.*, 40 Ch. D. 141; 58 L. J. Ch. 48; *Lord Bute's Case*, (1892) 2 Ch. 100; 61 L. J. Ch. 357; *Re Kingston Cotton Mill Co.*, (1896) 1 Ch. 331; 2 Ch. 279; 65 L. J. Ch. 673.

(*b*) *Stanhope's Case*, 1 Ch. 161; and see, also, *Ashbury Carriage, &c. Co.'s Case*, L. R. 7 H. L. 653.

(*c*) *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869; *County of Gloucester Bank* v. *Rudry Merthyr Co.*, (1895) 1 Ch. 629; 64 L. J. Ch. 451.

(*d*) *Irvine* v. *Union Bank of Australia*, 2 App. C. 366.

(*e*) *British American Telegraph Co.* v. *Albion Bank*, L. R. 7 Ex. 119, 122.

(*f*) *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145, 157.

The company, moreover, will be liable for the false and fraudulent misrepresentations of an agent acting in the course of its business (*g*). Under the Directors' Liability Act, 1890 (*h*), directors are personally liable to subscribers who take shares on the invitation of a prospectus for any loss or damage sustained by reason of any untrue statement in the prospectus, subject, however, to certain restrictions in the Act contained, giving protection where there have been reasonable grounds for believing such statements to be true.

For negligence.

A director is also liable for negligence in the performance of his duties (*i*). But mere imprudence in the exercise of his powers will not subject him to personal responsibility, unless the imprudence be so manifest as to amount to "*crassa negligentia*," for directors acting as the company's agents are only bound to use the same prudence as they would exercise under the same circumstances on their own behalf; and if authorised to do an act in itself imprudent, they are not to be held responsible for its consequences (*k*), nor will the Court visit directors with the consequences of a mere error of judgment if they have acted *bonâ fide* and intending what was best for the interests of the company (*l*). Even where a dividend was declared in the erroneous but *bonâ fide* belief that profits had been earned to justify it, the directors were held to be not liable (*m*).

Appointment of directors.

The subscribers of the memorandum of association have generally the powers of directors, and must, in fact, have them until they have appointed other persons to the office (*n*); and the signatures of two out of the seven

(*g*) *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259.

(*h*) 53 & 54 Vict. c. 64.

(*i*) *Re General Light Co., Marzetti's Case*, 28 W. R. 541.

(*k*) *Overend and Gurney Co.* v. *Gibb*, L. R. 5 H. L. 480; and see *Turquand* v. *Marshall*, L. R. 4 Ch. 376.

(*l*) *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, (1899) 2 Ch. 423; 68 L. J. Ch. 699.

(*m*) *Re National Bank of Wales*, (1899) 2 Ch. 629; 63 L. J. Ch. 634; *Re Kingston Cotton Mill*, (1896) 2 Ch. 279; 65 L. J. Ch. 673.

(*n*) *Re Brighton Brewery Co., Hunt's Case*, 37 L. J. Ch. 278,

original subscribers of the memorandum have been held to give a *primâ facie* authority to an agent to bind the company (*o*). The articles usually either name the first directors or specially provide for their appointment. In the case of companies formed since the Act of 1900, and inviting public subscription, if the articles name the first directors, sect. 2 of the Act requires the directors, before the articles are registered or a prospectus naming them is published, to file with the registrar a consent to act, and either to sign the memorandum for their qualification shares, or to file a contract in writing to take such shares.

Qualification.

It was provided by a former Act of Parliament (*p*) that every director should hold at least one share in the company, but the Statute of 1862 contains no such provision. Where, however, as is almost always the case, the articles of association require that every director shall be the holder of a certain number of shares, then the acceptance of those shares becomes a necessary qualification for the office of director; but the fact of his acting as director without sufficient qualification did not under the former Acts amount to a contract to take the qualifying shares (*q*).

By the Companies Act of 1862 (*r*), and generally by the articles of association, it is provided that any defect afterwards discovered in the appointment or qualification of the directors, managers, &c. of a company, shall not invalidate their past acts, the general effect of which provisions may be taken to be that where the business of a company is conducted in an ordinary business-like manner, those persons who are allowed to hold themselves out to the public as its agents or managers, will, whether properly appointed or not, have all the powers of such

280. See Sched. I. to Companies Act, 1862, Table A., Arts. 52, 53; *Re Great Northern Salt Works*, 44 Ch. D. 472; 59 L. J. Ch. 288.

(*o*) *Totterdell* v. *Fareham Brick and Tile Co.*, L. R. 1 C. P. 674.

(*p*) 7 & 8 Vict. c. 110, s. 28. See Buckley on Companies, 7th ed. p. 56.

(*q*) *Re Wheal Buller Consols*, 38 Ch. D. 42; 57 L. J. Ch. 333; *Browne's Case*, 9 Ch. 102; *Hewitt's Case*, 25 Ch. D. 283; 53 L. J. Ch. 343.

(*r*) S. 67.

agents, &c. to bind the company, that is, that "*as between the company and persons having no notice to the contrary*, directors *de facto* are as good as directors *de jure*" (*s*), at least until the invalidity of their appointment is established (*t*). If the company issues a public prospectus, any director named in the articles or the prospectus must under the Act of 1900 take his qualification shares from the company (*u*), and must obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the regulations of the company (*x*). Failure to comply with the Act not only vacates the office of director, but subjects the offender to a penalty of five pounds a day.

Remuneration.

The payment of directors is a matter to be determined by the articles or by the company in general meeting. Not being in the position of ordinary employés, if the articles make no provision for remuneration, directors are not entitled to claim remuneration according to the value of their services (*y*). If the articles name a specific sum, this cannot be exceeded even if all the shareholders know the facts (*z*), but the amount named may be recovered by action, or may be proved for in competition with other creditors in a winding-up (*a*). Under the Act of 1900, if a prospectus is issued it must state the provisions of the articles as to the directors' remuneration (*b*).

Quorum.

What number of directors acting together have power to exercise the various functions, *e.g.*, of allotting shares, making "calls," &c., and to bind the company by their acts, is a matter to be determined by a reference to the articles. Where, however, these do not prescribe what proportion of the whole board of directors shall form a

(*s*) *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869.
(*t*) *Re Bridport Old Brewery Co.*, L. R. 2 Ch. 191.
(*u*) S. 2.
(*x*) S. 3.
(*y*) *Dunston* v. *Imperial Gaslight Co.*, 3 B. & Ad. 125.
(*z*) *Re Newman & Co.*, (1895) 1 Ch. 674; 64 L. J. Ch. 407; *Re Oxford Benefit Building Soc.*, 35 Ch. D. 502; 56 L. J. Ch. 98.
(*a*) *Re Lundy Granite Co.*, 26 L. T. 673; *Exp. Beckwith*, (1898) 1 Ch. 324; 67 L. J. Ch. 164.
(*b*) S. 10 (b).

"quorum," it has been decided that the number who usually act together for the company must be taken to constitute one (*c*):

A director being an agent cannot delegate his powers except in so far as he is specially authorised to do so (*d*), for "*Delegatus non potest delegare.*" But most companies' articles authorise such delegation of the director's powers, *e.g.*, of allotment to a committee of some of their own number (*e*); and there being such power, delegated authority will be presumed when one or two of the delegate directors act by themselves in a matter properly within the ordinary business of the company (*f*). Delegation of powers.

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8. *Winding-up.*

The dissolution of the company as a working and trading corporation may be brought about, as has been already said, in one of two modes: that is, either by a voluntary or compulsory "winding-up" of its affairs.

An order for the compulsory winding-up of a company may be obtained from the Court generally whenever such winding-up seems "just and equitable" (*g*). Such an order is commonly made when the company has not commenced business for a year after its incorporation, or suspends its business for a whole year, or is unable to pay its debts (*h*), and in certain other cases (*h*) upon petition presented for the purpose, after notice thereof by advertisement (*h*), such petition to be presented either by the Compulsory winding-up. Who may petition.

(*c*) *In re Tavistock Ironworks Co., Lyster's Case*, 4 Eq. 233.

(*d*) *In re County Palatine Loan and Discount Co., Cartmell's Case*, 9 Ch. 691; and see *Harris's Case*, L. R. 7 Ch. 587.

(*e*) See Table A., Art. 68.

(*f*) *Totterdell* v. *Fareham Brick, &c. Co.*, L. R. 1 C. P. 674.

(*g*) Comp. Act, 1862, s. 79, sub-s. 5.

(*h*) As to which see Comp. Act, 1862, s. 80; Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63).

Contributory

company itself, or by any creditor, or by any contributory who has been the holder of shares for a period of at least six months during the eighteen months immediately preceding the winding-up (*i*), provided, at any rate, that he has paid all calls due from him (*k*). The assignee of debentures of the company which are secured by a trust deed—the company assigning all their property to trustees for the benefit of the debenture holders—may apply for a winding-up order on the ground that the interest on the debentures is in arrear (*l*). On the other hand, any unpaid creditor of a company which is in fact in a state of insolvency, whose debt is ascertained and immediately payable, is *primâ facie* entitled as of right to such an order (*m*); but where the petitioner can gain nothing by it, or acts out of mere malice, and *à fortiori* where the other creditors object, such an order will not be made, nor if the petitioner's debt be of insignificant amount or be *bonâ fide* disputed by the company, or if no satisfactory evidence be adduced of the company's insolvency (*n*).

Creditor.

Grounds of petition.

The reasons which will induce the Court to make a "winding-up" order, in so far as the making of such an order is left entirely to their discretion under the "just and equitable" clause, cannot be exactly defined; but the Court will be loth to decide in the absence of any evidence of insolvency, suspension of working, &c., and especially at the instance of a shareholder, that the company shall not be allowed to carry on its business (*o*). For the shareholder has by his right of attending meetings, voting, &c., a certain power of control over the affairs of the company,

(*i*) Unless the shares have devolved upon him by the death of a former holder. See Comp. Act, 1867, s. 40.

(*k*) *Re Crystal Reef Gold Mining Co.*, (1892) 1 Ch. 408; 61 L. J. Ch. 208.

(*l*) *In re Olathe Silver Mining Co.*, 27 Ch. D. 278.

(*m*) *In re Chapel House Colliery Co.*, 24 Ch. D. 259; 52 L. J. Ch. 934; *Re Combined Weighing Co.*, 43 Ch. D. 99; 59 L. J. Ch. 26.

(*n*) *In re Gold Hill Mines*, 23 Ch. D. 210.

(*o*) *Re Langham Skating Rink Co.*, 5 Ch. D. 669.

and mere mismanagement or misapplication of the funds on the part of the directors will not, until it has produced insolvency, give the Court authority to wind up the company, though such misconduct might be the subject of an action (*p*). Nor will an "*ultra vires*" act meditated by a majority of the company, for that may be restrained, on the application of an individual shareholder, by injunction (*q*). But if the business of the company be one which circumstances have made it impossible to carry on, the Court will order a winding-up (*r*). The Court will not, however, enter into an enquiry as to the likelihood of the business being profitably worked, or make an order simply because the company is not prosperous, so long as it is commercially solvent (*s*). The commonest ground of application is inability of the company to pay its debts. The Act of 1862 (*t*) provides that a company shall be deemed unable to pay its debts whenever a creditor to whom it is indebted in a sum exceeding £50 has served on it a demand requiring payment of the sum so due and the company has for a space of three weeks neglected to pay, secure, or compound the same; or whenever execution or other process issued on judgment is returned unsatisfied. Apart from this it is sufficient to prove inability by evidence. Mismanagement.

It has already been observed (*u*) that, both present and, subject to certain restrictions, *past* members of the company are liable as contributories in the winding-up to the extent of the amount unpaid upon their shares, or which they have guaranteed to pay (*x*). The determination, Who are contributories.

(*p*) *Re Anglo-Greek Steam Co.*, L. R. 2 Eq. 1.

(*q*) *Re Irrigation Co. of France, Exp. Fox*, L. R. 6 Ch. 176, 184.

(*r*) *In re German Date Coffee Co.*, 20 Ch. D. 169; 51 L. J. Ch. 564; *Re T. E. Brinsmead & Co.*, (1897) 1 Ch. 406; 66 L. J. Ch. 290.

(*s*) *Re Langham Skating Rink Co.*, *sup.*

(*t*) S. 80.

(*u*) See p. 658, *supra.*

(*x*) Comp. Act, 1862, s. 38, the precise effect of which upon the two classes of contributories is elaborately discussed in Buckley on Companies, 7th ed., pp. 158—173.

"Members." however, of the important question who are "members," past or present, of the company is not always a simple matter. Persons who have signed the memorandum may *primâ facie* be taken to be members, although there are cases where the signature has been held not to involve such liability (*y*). On the other hand, where a person in the position of a promoter allows himself to be represented as a director and shareholder on the prospectus, it will be immaterial that his signature is not actually attached to the memorandum (*z*). The Companies Act (*a*) defines as a member "anyone who has agreed to become a member"; and under this section a director who accepts an office to which "membership," or the holding of a certain number of shares, is a necessary qualification, will, as a general rule, be held to have so agreed (*b*). And it must be remembered generally, that "a man may become a contributory to a company *by his acts*" (*c*), without legal membership. It may be added that the members of the company, in respect of their right as members to dividends or profits, cannot compete in the winding-up with the outside creditors of the company (*d*).

Effect of winding-up order. The effect of an order for the winding-up of the company can only be learnt in detail from a perusal of the Acts (*e*); but it may be said generally, that from the moment of the making of the winding-up order, the company has no legal existence except for the purpose of bringing its affairs to a speedy conclusion in the manner best calculated to promote the interests of the creditors. The liquidator—whether official or otherwise—who represents the company for the purposes of the winding-up is practically empowered to do all acts conducing to the

(*y*) *Smyth's Case*, I. R. 2 Eq. 673.

(*z*) *Palmer's Case*, I. R. 2 Eq. 573.

(*a*) Comp. Act, 1862, s. 23.

(*b*) *Miller's Case*, see remarks of Jessel, M. R., 3 Ch. D. 665.

(*c*) *Spackman* v. *Evans*, L. R. 3 H. L. 171, 208.

(*d*) Companies Act, 1862, s. 38, sub-s. 7.

(*e*) *Ibid.* ss. 79—128; Winding-up Act, 1890.

above result. Thus, it may be mentioned that, although the winding-up order is in itself a notice of discharge to the servants of the company (*f*), the liquidator may waive this notice by continuing to employ them, in a case where the immediate cessation of the company's business would be improper and injurious, in which case, the employés continue in their position under the original contract with the company, and are entitled to notice of discharge in pursuance thereto (*g*). In general, the same principle applies to all the contracts of the company. If the liquidators elect to continue them, they are continued (*h*), with all the incidents belonging to them. But a most important principle to be kept in mind is that the property of the company, wherever situated, becomes, from the date of the winding-up order, *the property of its creditors* (*h*). The company suffers bankruptcy.

Discharge to company's servants.

Contracts generally.

And by the Supreme Court of Judicature Act, 1875 (*i*), it has been provided, that in the winding-up under the Companies Acts of 1862 and 1867 (now modified by the Winding-up Act, 1890), of any company whose assets prove insufficient for the payment of its liabilities, the rules applied to individuals under the law of bankruptcy shall, to a certain extent, apply in the case of bankrupt companies. The effect of this enactment is, that with regard to companies wound up since November, 1875 (*k*), the rights of secured and unsecured creditors respectively, and the rules as to priority of claims against the assets of the company (*l*), and as to the administration of those assets generally (*m*), are to be determined by a reference to the Bankruptcy Act for the time being: the claims of creditors against the estate of a bankrupt individual,

Rules of bankruptcy to be observed.

(*f*) *Chapman's Case*, L. R. 1 Eq. 346.
(*g*) *Re English Joint Stock Bank, Exp. Harding*, L. R. 3 Eq. 341.
(*h*) See *Wiltshire Iron Co.* v. *Great Western Rail. Co.*, L. R. 6 Q. B. 101.
(*i*) 38 & 39 Vict. c. 77, s. 10.
(*k*) *In re Joseph Suche & Co.*, 1 Ch. D. 48.
(*l*) *Williams* v. *Hopkins*, 18 Ch. D. 370, 377.
(*m*) *Re Albion Steel Co.*, 7 Ch. D. 547—549.

or of a bankrupt company, being thus put upon the same footing: though, with regard to the property available for distribution, there would still be important differences (*n*).

(*n*) *Re Withernsea Brickworks*, 16 Ch. D. 337, 341; 50 L. J. Ch. 185. As to the general principles of administration of estates of insolvent companies, see *In re Dronfield Silkstone, &c. Co.*, 23 Ch. D. 511; 52 L. J. Ch. 963; *Re London Metallurgical Co.*, (1895) 1 Ch. 758; 64 L. J. Ch. 442.

CHAPTER V.

PARTITION AND THE SETTLEMENT OF BOUNDARIES.

Origin of jurisdiction.

In partition.

THE jurisdiction of equity with respect to both partition and the settling of boundaries originated in the insufficiency of the common law remedy. As regards partition it is true that proceedings might be taken at common law by writ of partition; but they were at a very early period found to be inadequate and incomplete. Various and complicated interests are often attached to the ownership of real estate, and when the titles were in any degree complicated, and discovery was needed to ascertain them, the processes of law were very inapt to deal with them. Moreover, Courts of law were content merely to declare the rights of the parties, and were incapable of enforcing a partition by means of mutual conveyances; nor could they regulate the appropriate and indispensable compensatory adjustments. For these and other similar reasons, equity assumed a general concurrent jurisdiction with Courts of law in all cases of partition. In so doing it usually followed the analogies of the law, and decreed partition in such cases as Courts of law recognised as fit for their interference. Equity, however, did not limit its jurisdiction to cases cognisable or relievable at law; there were many cases in which it interfered where law would not have done so—for instance, where an equitable title was set up. Now, by s. 34 of the Judicature Act, 1873, the jurisdiction in cases of partition, which was formerly common to Courts both of law and equity, is assigned exclusively to the Chancery Division of the High Court.

In settlement of boundaries.

With respect to the settling of boundaries, different origins have been alleged for the jurisdiction. It is undoubtedly as old as the reign of Elizabeth; but whether arising from the intent to prevent multiplicity of suits at law, or from the issuing of a commission at first by request or consent of the parties, and then on the application of one party who should succeed in establishing an equitable ground for requiring it, or whether it was founded by the chancellors upon the basis of the *actio finium regundorum* of Roman law, is disputed. Whatever its origin, the case of *Wake* v. *Conyers* well illustrates its present character and extent.

Compared.

It resembles the remedy of partition in that the relief in both cases is effected by similar machinery—namely, the issuing of a commission with authority to inquire as to the rights of the parties, and to settle them definitely—and for this reason the two subjects have been here classed together. They differ, however, conspicuously in that whereas partition is to those parties within its scope a matter of right, the commission to settle boundaries will not be granted unless it is claimed by virtue of some equity superinduced by the act of the parties. It is eminently dependent upon the discretion of the Court.

Section I.—Partition.

I. *Who may claim Partition.*
II. *What is subject to Partition.*
III. *Mode of effecting Partition.*
IV. *The Partition Acts.*
V. *Costs.*

I. *Who may claim Partition.*

Co-parceners, joint tenants, tenants in common.

1. At common law co-parceners only had a right to compel partition. By the Statute of Partition (*a*) joint tenants and tenants in common of any estate of inheritance in their own right, or that of their wives, might be compelled to make partition between them, and by 32 Hen. VIII. c. 32, s. 1, joint tenants and tenants in common for lives or years are declared compellable to make partition in the same way; and this right may be still asserted, notwithstanding the abolition of the common-law writ of partition by 3 & 4 Will. IV. c. 27, s. 36 (*b*).

Tenants for life, and for a term.

2. A decree of partition is a matter of right, and it has been held to be no objection to a bill that the interests of all parties would not be finally bound by it. Consequently, a decree may be obtained either by or against a person having only a limited interest as a tenant for life (*c*), or a tenant for life determinable on marriage (*d*), or a tenant for a term (*e*); and where there are remaindermen who may come *in esse* and be entitled, they will be bound by a decree made against the tenant for life (*f*).

Tenants in tail.

A tenant in tail may also obtain a decree for a par-

(*a*) 31 Hen. 8, c. 1.
(*b*) *Mayfair Property Co.* v. *Johnston*, (1894) 1 Ch. 508; 63 L. J. Ch. 399.
(*c*) *Gaskell* v. *G.*, 6 Sim. 643.
(*d*) *Hobson* v. *Sherwood*, 4 Beav. 184.
(*e*) *Baring* v. *Nash*, 1 V. & B. 551.
(*f*) *Wills* v *Slade*, 6 Ves. 498.

tition (*g*); and a partition between tenants in tail, though by parol, binds the issue (*h*).

Claimants must be entitled in possession.

3. A person can only compel partition when entitled in possession. A bill was held not maintainable by a joint-tenant or tenant in common in reversion or remainder (*i*); nor could he, after bill filed, by acquiring possession and amending his bill, have put himself in a better position.

Prior to the Judicature Acts the Court of Chancery would not entertain a suit for partition where the legal title was in dispute, and its decision would in effect be an adjudication upon the legal right (*k*). But the same reasoning does not now apply, and the High Court has ample jurisdiction to entertain a suit for partition, though a question as to the legal title may be involved (*l*).

Mortgagees.

4. A mortgagee of an undivided share may sue for foreclosure and partition, and move for a receiver of the rents of the undivided share of the mortgagor (*m*). And an equitable tenant in common of lands in mortgage is entitled to partition as against his co-tenant, notwithstanding that he has possessed himself of the legal estate in the whole property by procuring a transfer of the mortgage (*n*).

Plaintiff must show title.

5. The title of the plaintiff to an interest in the property of which he seeks partition must be shown (*o*). Where, however, there is only a small failure in the proof of title, or the interests of the parties in the property are uncertain, they may be ascertained by a reference, and under the old practice this must have been done previous to the commission issuing; for, as is laid down in *Agar* v. *Fairfax* (*p*), it was not the duty of the commissioners to

(*g*) *Brook* v. *Hertford*, 2 P. Wms. 518.
(*h*) *Rose* v. *R.*, 2 Vern. 233, cited.
(*i*) *Evans* v. *Bagshaw*, 8 Eq. 469; 5 Ch. 340.
(*k*) *Ibid.*; *Giffard* v. *Williams*, 5 Ch. 546; *Slade* v. *Barlow*, 7 Eq. 296.
(*l*) *Waite* v. *Bingley*, 21 Ch. D. 674, 681; 51 L. J. Ch. 671.
(*m*) *Fall* v. *Elkins*, 9 W. R. 861.
(*n*) *Waite* v. *Bingley*, *sup.*
(*o*) *Cartwright* v. *Pultney*, 2 Atk. 380; *Jope* v. *Morshead*, 6 Beav. 213.
(*p*) 17 Ves. 533.

ascertain the proportions and rights of the parties; their duty commenced when these were ascertained. Uncertainty as to the shares of the parties is, therefore, not an objection to partition, but only a ground for postponing it until such shares have been ascertained.

Dowress.

6. Upon the same principles as in cases of partition, although dower was originally a mere legal demand, a widow, being a joint owner, became entitled in equity to an assignment of one-third of the lands of which her husband was seised in fee or in tail, which her issue might possibly have inherited. And since the Dower Act (*q*) the right applies as well to equitable as to legal estates.

Trust for sale.

Where the property in question is vested in trustees upon trust to sell at their discretion, the Court has no jurisdiction to order a partition. In such a case the property is regarded in equity as converted into money, to which the remedy of partition has no application (*r*). But a similar reasoning does not apply where there is a mere power of sale (*s*).

II. *What is subject to Partition.*

Freeholds.

1. Freeholds have been always subject to partition; but previous to 4 & 5 Vict. c. 35 (amended by 21 & 22 Vict. c. 94), the Court of Chancery, though it could decree specific performance of an agreement to divide copyholds (*t*), had no power to direct the partition of copyholds or of customary freeholds. It was given, however, by s. 85 of that Act (*u*), which, though now repealed, is in this respect re-enacted by the Copyhold Act, 1894 (*x*).

Copyholds.

(*q*) 3 & 4 Will. 4, c. 105. See *Mundy* v. *M.*, 2 Ves. jr. 122.

(*r*) *Biggs* v. *Peacock*, 22 Ch. D. 284; 23 *ib.* 200; 52 L. J. Ch. 1; *Taylor* v. *Grange*, 15 *ib.* 165.

(*s*) *Boyd* v. *Allen*, 24 Ch. D. 622; 53 L. J. Ch. 701.

(*t*) *Bolton* v. *Ward*, 4 Hare, 530.

(*u*) *Horncastle* v. *Charlesworth*, 11 Sim. 315.

(*x*) 57 & 58 Vict. c. 46, s. 87.

Leaseholds.

2. Leaseholds, also, under 32 Hen. VIII. c. 32, s. 1, were subject to partition during the term, at the instance of the termor of an undivided share (*y*); but partition of leaseholds was refused where the landlord might immediately obtain an injunction to restrain the parties from executing it by any act amounting to waste, or where the Court could not protect one of the tenants in common from a breach of covenant which might be committed by the other (*z*).

Manor advowson.

3. A partition has been decreed of a manor (*a*) and of an advowson (*b*); in the latter case the right to present being sometimes given alternately, in others determined by lot (*b*). Under the present law, however, a sale would always be directed (*c*).

4. The Court has no power to decree partition of lands out of its jurisdiction, for instance, in Ireland (*d*). The principle of *Penn* v. *Lord Baltimore* (*e*) being limited to judgments *in personam*, evidently does not apply to such a dealing with the land itself as is involved in partition.

III. *Mode of effecting Partition.*

Commission, when directed.

1. It is not the ordinary practice for a commission to issue for the purpose of making a partition. If inquiries are necessary, it can be done in Chambers; if not, in Court at the hearing. There are many cases, however, in which a commission may still be directed to issue in accordance with the old practice of the Court, especially where the interests of parties under disability are concerned; but

(*y*) *Baring* v. *Nash*, 1 V. & B. 551.
(*z*) *North* v. *Guinan*, Beat. 342.
(*a*) *Sparrow* v. *Friend*, 1 Dick. 348.
(*b*) *Johnstone* v. *Baber*, 6 De G. M. & G. 439.
(*c*) See *infra*; *Young* v. *Y.*, 13 Eq. 175, note.
(*d*) *Carteret* v. *Pettus*, 2 Ch. Ca. 214; 2 Swanst. 323, n.
(*e*) *Supra*, p. 16.

sometimes the Court would approve of a partition without a commission even where infants were interested, upon proper evidence of value (*f*).

2. The inconvenience or difficulty in making a partition has been held to be no objection to a decree (*g*). The consequences of this, previous to the Partition Acts, were often sufficiently absurd. In *Turner* v. *Morgan* (*h*) there was a decree for the partition of a single house. The commissioners allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard. Exception was taken to this by the defendant, but Lord Eldon said he did not know how to make a better partition for them; the parties ought to agree to buy and sell. But it has never been deemed necessary that every house on an estate should be divided, if a sufficient part of the whole could be allotted to each; and in making a partition the Court would take the convenience of the parties into consideration (*i*). If the commissioners can find nothing to guide their discretion, they may cast lots; if they cannot agree, they may make separate returns, and the Court may deal with them as it may think advisable (*i*).

Difficulty no objection.

Turner v. *Morgan.*

3. For the sake of convenience, in equity a recompense has been made, either by a sum of money or rent for owelty, or equality of partition (*k*). Where one of the parties had made improvements on the estate an inquiry was directed as to the amount of compensation to be given (*l*). Rights could not have been adjusted in this manner under the writ at law. And the commissioners themselves, unless directed by a decree, have no power to award such sums to be paid; such power rests with the Court (*m*).

Recompense.

(*f*) *Brassey* v. *Chalmers*, 4 De G. M. & G. 528.

(*g*) *Warner* v. *Baynes*, Amb. 589.

(*h*) 8 Ves. 143; 11 Ves. 157.

(*i*) *Clarendon* v. *Hornby*, 1 P. Wms. 446; *Canning* v. *C.*, 2 Drew. 436.

(*k*) *Clarendon* v. *Hornby*, *sup.*

(*l*) *Williams* v. *W.*, 68 L. J. Ch. 528.

(*m*) *Mole* v. *Mansfield*, 15 Sim. 41.

In making a decree for partition, the equitable rights of all the parties interested in the estate have been adjusted; for instance, effect has been given to an equitable lien on the premises for improvements; and where one of a number of joint owners has received more than his share of the rents of the estate, the Court has directed an account (*n*).

Rights of third parties not affected.

4. A partition never affects the rights of third parties, such as commoners or mortgagees; and persons having such interests are therefore not necessary parties to the suit (*o*); and though it has been laid down that the legal title should be before the Court (*p*), this does not seem to have been insisted on; and now service of notice of a decree under s. 9 of the Partition Act, 1868 (*q*), will be sufficient to bind persons who formerly were made parties in the first instance.

Mutual conveyances.

5. After a partition in law no conveyances were requisite, as the rights of all parties were concluded by the judgment. But in equity, when the shares have been allotted to the parties, the partition is perfected by reciprocal conveyances; though in a case where the shares were minute and complicated, the Court, in order to save expense, instead of directing such conveyances, has declared each of the parties trustee as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee under the Trustee Acts, with directions to convey to the several parties their allotted shares (*r*). Where infants were parties, the conveyances were respited until they came of age, and a day then given them to show cause against the decree; but now under the Trustee Act, 1893 (*s*), s. 31, the Court may declare the infant, or

(*n*) *Swan* v. *S.*, 8 Price, 518; *Story* v. *Johnson*, 2 Y. & C. Ex. 586; *Lorimer* v. *L.*, 5 Madd. 363.

(*o*) *Swan* v. *S.*, *sup.*; *Sinclair* v. *James*, (1894) 3 Ch. 554; 63 L. J. Ch. 873.

(*p*) *Miller* v. *Warmington*, 1 J. & W. 493.

(*q*) 31 & 32 Vict. c. 40.

(*r*) *Shepherd* v. *Churchill*, 25 Beav. 21.

(*s*) 56 & 57 Vict. c. 53, re-enacting and extending 13 & 14 Vict. c. 60, s. 30.

indeed any party to the action, a trustee of the shares allotted in severalty to others (*t*), or that the interests of unborn persons who might claim under any party to the action are the interests of persons who on coming into existence would be trustees within the meaning of the Act, and thereupon the Court may make a vesting order relating to the rights of such persons as if they had been trustees. The Lunacy Act, 1890 (*u*), makes similar provision in the case of lunatics.

IV. *The Partition Acts.*

Before the Partition Act, 1868, the Court had jurisdiction in a suit, even where infants were interested, if it appeared for their benefit, to direct a sale instead of a partition, if it was desired by the parties *sui juris* (*x*). So a sale was directed in a case in which a married woman was interested for her separate use without power of anticipation (*y*). But if one of several tenants in common refused to sell, he could, whatever the consequences to all parties, insist upon a partition (*z*). Sale before the Acts.

The powers of Courts of equity in dealing with actions for partition have, however, been largely increased and improved by the operation of the Partition Acts, 1868 and 1876, which are now to be read as one.

1. By s. 3 of the Act of 1868 (*a*), it is enacted that "In a "suit for partition, where, if this Act had not been passed, "a decree for partition might have been made, then, if it "appears to the Court that by reason of the nature of the "property to which the suit relates, or of the number of 31 & 32 Vict. c. 40, s. 3,

(*t*) *Bowra* v. *Wright*, 4 De G. & Sm. 265; *Davis* v. *Ingram*, (1897) 1 Ch. 477; 66 L. J. Ch. 386.
(*u*) 53 Vict. c. 5, s. 135.
(*x*) *Davis* v. *Turvey*, 32 Beav. 554.
(*y*) *Fleming* v. *Armstrong*, 34 Beav. 109.
(*z*) *Griffies* v. *G.*, 11 W. R. 943.
(*a*) 31 & 32 Vict. c. 40.

" parties interested or presumptively interested therein, or " of the absence or disability of some of those parties, or of " any other circumstance, a sale of the property and distri- " bution of the proceeds would be more beneficial for the " parties interested than a division of the property between " or among them, the Court may, on the request of any of " the parties interested, and notwithstanding the dissent or " disability of any others of them, direct a sale of the pro- " perty accordingly, and may give all necessary or proper " consequential directions."

and s. 4,

2. By s. 4: " In a suit for partition, where if this Act " had not been passed a decree for partition might have " been made, then if the party or parties interested indi- " vidually or collectively to the extent of one moiety or " upwards in the property to which the suit relates request " the Court to direct a sale of the property and a distribu- " tion of the proceeds, instead of a division of the property " between or among the parties interested, the Court shall, " unless it sees good reason to the contrary, direct a sale of " the property accordingly, and give all necessary or proper " consequential directions."

compared.

3. The distinction between these two sections requires careful notice. The former gives power to the Court to direct a sale on the request of *any of the parties* interested, if, in the opinion of the Court, a sale would be more beneficial than a division of the property. The latter provides that if the parties interested *to the extent of a moiety or upwards* request a sale, the Court shall sell, unless it sees good reason to the contrary. Thus if the party or parties requesting a sale are interested in less than a moiety of the property, it is for them to prove to the Court that a partition cannot reasonably be made (*b*); and if they succeed in this the Court may so decree. This avoids the recurrence of any such difficulty as that in *Turner* v.

(*b*) *Dyer* v. *Paynter*, 33 W. R. 806.

Morgan (*c*). But if the party or parties praying a sale have a moiety or upwards of the interest, then the advantage of a sale is *primâ facie* presumed, and the burden of proving that it is not advantageous is on those who oppose it (*d*).

In a case under s. 3 the Court only regards the question as to whether a sale would or would not be "more beneficial" for the parties interested in a pecuniary view, and it will not go into questions of sentiment (*e*). If the advantage of a sale is established, the Court is not restrained from granting it by the fact that only a small proportion of the parties interested request a sale (*f*). In simple cases, where the value of the property is small, the Court may order a sale at the trial, on being satisfied as to the parties interested, without inquiry (*g*); but the general rule is for an inquiry at chambers to be directed. Under this section, also, orders for sale have been made at the request of infants (*h*) and married women (*i*).

Under s. 4 it is imperative on the Court to order a sale, unless it sees good reason to the contrary. The mere fact that the owners of the other moiety oppose the sale is not a reason to the contrary (*k*), nor is the fact that the income of an infant defendant interested in a moiety might be materially diminished by a sale (*l*), nor that the owner of one moiety is a yearly tenant of the whole property, and occupies it for commercial purposes and resides thereon (*m*). In a case in Ireland, it has indeed been laid down that the only good reason to the contrary is to

(*c*) *Supra*, p. 679.

(*d*) *Drinkwater* v. *Ratcliffe*, 20 Eq. 530; *Pemberton* v. *Barnes*, 6 Ch. 685; *Rowe* v. *Gray*, 5 Ch. D. 263.

(*e*) *Drinkwater* v. *Ratcliffe*, *sup.*

(*f*) *Pemberton* v. *Barnes*, *sup.*; *Allen* v. *A.*, 21 W. R. 842.

(*g*) *Wood* v. *Gregory*, 43 Ch. D. 82; 59 L. J. Ch. 232.

(*h*) *Young* v. *Y.*, 13 Eq. 175, n.; *France* v. *F.*, *ibid.* 173; *Grove* v. *Comyn*, 18 Eq. 387.

(*i*) *Davis* v. *Wietlisbach*, cited, 18 Eq. 388.

(*k*) *Pemberton* v. *Barnes*, 6 Ch. 685, 694; *Porter* v. *Lopes*, 7 Ch. D. 358.

(*l*) *Rowe* v. *Gray*, *sup.*

(*m*) *Wilkinson* v. *Joberns*, 16 Eq. 14.

show affirmatively that there is no difficulty in making an actual partition (*n*).

S. 5, 4. Section 5 enacts that "In a suit for partition, where "if this Act had not been passed a decree for partition "might have been made, then if any party interested in "the property to which the suit relates requests the Court "to direct a sale of the property, and a distribution of the "proceeds, instead of a division of the property between or "among the parties interested, the Court may, if it thinks "fit, unless the other parties interested in the property, "or some of them, undertake to purchase the share of the "party requesting a sale, direct a sale of the property, and "give all necessary or proper consequential directions; and "in case of such undertaking being given, the Court may "order a valuation of the shares of the party requesting "a sale in such manner as the Court thinks fit, and may "give all necessary or proper consequential directions."

and s. 6, And by s. 6: "On any sale under this Act, the Court "may, if it thinks fit, allow any of the parties interested "in the property to bid at the sale on such terms as to "non-payment of deposit, or as to setting off or accounting "for the purchase-money, or any part thereof, instead of "paying the same, or as to any other matters as to the "Court seem reasonable."

explained. The construction to be put upon s. 5 was explained by Sir G. Jessell, M.R., in *Drinkwater* v. *Ratcliffe* (*o*), where it is pronounced to apply to a case not coming under s. 4, inasmuch as a moiety do not apply for sale, nor under s. 3, inasmuch as the Court is here supposed to see no reason for preferring a sale to a partition; in other words, to a case where parties representing less than a moiety apply for a sale, but do not succeed in showing that it is more beneficial than partition. In such circumstances s. 5 confers a new power on any party to apply for a

(*n*) *In re Langdale's Estate*, 5 I. R. E. 572.
(*o*) 20 Eq. 530.

sale, and declares that he is entitled to it unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale. In short, if one party, whatever his interest or reason, desires a sale, the parties objecting must, if the Court thinks fit, either withdraw their objections, or else be prepared to buy his share. But there is nothing to compel a man to sell his share, and it is open for a party requesting a sale, on an offer being made to purchase his interest, to withdraw his request (*p*). S. 5, in fact, gives an entirely new power to any party who is prepared to sell his own interest, to insist upon and obtain a decree of sale, unless some one is willing to buy his share, but does not give to the Court power to compel any party interested to sell his share at a valuation; and if the party rejects the offer of a valuation, he still has his common law right to a partition, and all rights conferred by the other sections of the Act, as far as he can bring himself within them (*q*). If no party undertakes to purchase the applicant's share, the Court may exercise its discretion, and is not bound to decree a sale (*r*).

Conduct of sale.

As to s. 6, though as a general rule parties having the conduct of a sale are not allowed to bid, this has sometimes been allowed (*s*). The more proper course, however, would seem to be to give the conduct of the sale to some third person, if the parties desire liberty to bid (*t*). A sale out of Court will only be directed under strict conditions (*u*); but under Order 51, rule 1 *a*, with a view to avoiding expense or delay, a sale out of Court may be directed, the proceeds of sale being brought into Court.

(*p*) *Williams* v. *Games*, 10 Ch. 204.

(*q*) See *Pitt* v. *Jones*, 5 App. C. 651, reversing *Gilbert* v. *Smith*, 8 Ch. D. 548, 11 Ch. D. 78, where the whole of the vexed question is fully considered and authoritatively decided.

(*r*) *Richardson* v. *Feary*, 39 Ch. D. 45; 57 L. J. Ch. 1049.

(*s*) *Pennington* v. *Dalbiac*, 18 W. R. 684.

(*t*) *Roughton* v. *Gibson*, 25 W. R. 269; *Field* v. *Dracup*, (1894) 1 Ch. 59; 63 L. J. Ch. 238.

(*u*) *Pitt* v. *White*, 57 L. T. 650; *Re Stedman*, 58 L. T. 709.

S. 9. 5. S. 9 was designed to avoid the difficulties which had previously often arisen from the non-joinder of all parties interested in the suit. But it was found ineffectual, and in consequence its amendment formed a conspicuous feature of the Act of 1876.

Doubts arising under the Act of 1868. 6. The following doubts which had arisen under the administration of the Act of 1868 led to fresh legislation:—

It was questioned whether a decree could be made for sale of an estate if the bill contained no prayer for partition, unless it were added by amendment (*x*).

39 & 40 Vict. c. 17, s. 7. To meet this, s. 7 of 39 & 40 Vict. c. 17, enacted that an action for partition should include an action for sale and distribution of the proceeds, and that it should be sufficient to claim a sale, and not necessary to claim a partition.

It having been held that a married woman could not enter into an undertaking to purchase under s. 5 of the Act of 1868 unless her husband joined therein, it was

S. 6. enacted by s. 6 of the Act of 1876 that in an action for partition a request for sale might be made on an undertaking to purchase given on the part of a married woman or other person under any disability by the next friend or other person authorised to act on behalf of such person; but that the Court should not be bound to comply with any such request or undertaking on the part of an infant unless it appeared that the sale or purchase would be for his benefit (*y*). Under this section a partition action may be brought by a person of unsound mind, not so found, by his next friend (*z*).

Notwithstanding s. 9 of the Act of 1868, considerable difficulty arose in cases where persons interested were out of the jurisdiction, it being held that no sale could be ordered unless every person interested in the property was either a party to the cause or had been served with notice

(*x*) *Teall* v. *Watts*, 11 Eq. 213.

(*y*) See *Grange* v. *White*, 18 Ch. D. 612; 50 L. J. Ch. 620; *Rimington* v. *Hartley*, 14 Ch. D. 630.

(*z*) *Porter* v. *P.*, 37 Ch. D. 430.

of the decree (*a*). And where a decree for sale had been made in the absence of such parties, the Court refused to allow it to be acted upon until notice of the decree had been given them by advertisement (*b*). The Court also refused to decree a sale in the absence of a married woman whose share in the property was vested in trustees (*c*).

These decisions led to s. 3 of the Act of 1876, which gave the Court discretion to dispense with service on persons whom the Act of 1868 required to be served, where service was impracticable, or could only be effected at an expense disproportionate to the value of the property, and to direct advertisements to be published instead of such service; and it was provided that after the expiration of the time limited by the advertisement such persons should be bound by the proceedings in the action, and that the Court might then direct a sale. S. 3.

Ss. 4 and 5 made provision for the payment into Court, further disposal, and ultimate distribution of the purchase-money, in cases in which service had been thus dispensed with.

V. *Costs.*

The rule laid down in *Agar* v. *Fairfax* (*d*) was that no costs would be given until the commission—that is to say, until the hearing—but that the subsequent costs of issuing, executing, and confirming the commission should be borne by the parties in proportion to the value of their respective interests, without any costs of the subsequent proceedings. It has been held that under the Partition Act, 1868, s. 10, the Court is not bound by

(*a*) *Hurry* v. *H.*, 10 Eq. 346.
(*b*) *Peters* v. *Bacon*, 8 Eq. 125. See *Pragnell* v. *Batten*, 16 Ch. D. 360; 50 L. J. Ch. 272.
(*c*) *Dodds* v. *Gronow*, 20 L. T. 104.
(*d*) 17 Ves. 533.

the old rule, and may now exercise its discretion (*e*). Sometimes the old rule has been followed (*f*), but the general rule now is that the entire costs should be borne by the parties in proportion to their interests as declared by the decree (*g*). This is, however, subject to the discretion of the Court under the influence of special circumstances. The general rule is that, although there may be incumbrances, only one set of costs is allowed out of each share (*h*).

(*e*) *Simpson* v. *Ritchie*, 16 Eq. 103.

(*f*) *Wilkinson* v. *Joberns*, 16 Eq. 14.

(*g*) *Cannon* v. *Johnson*, 11 Eq. 90; *Ball* v. *Kemp-Welch*, 14 Ch. D. 512; *Humphreys* v. *Jones*, 31 *ib.* 30.

(*h*) *Catton* v. *Banks*, (1893) 2 Ch. 221; 62 L. J. Ch. 600; *Langrish* v. *Vase*, W. N. (1901) 124; 84 L. T. 761; but see *Belcher* v. *Williams*, 45 Ch. D. 510.

Section II.—Settlement of Boundaries.

I. *Ownership of Soil must be in question.*

II. *Proof of Defendant's Possession and Plaintiff's Title, and necessity of Equitable Relief.*

III. *There must be Special Equitable Ground for Relief.*

We learn from the leading case of *Wake* v. *Conyers* (*a*) some of the essential conditions which are required to create a jurisdiction as to the settlement of boundaries—conditions which are not rendered obsolete by the Judicature Act (*b*).

Soil must be disputed.

I. There must be a *bonâ fide* dispute as to the ownership of the soil itself.

Thus the Court will not issue a commission to ascertain the boundaries of a parish in order to settle a dispute as to tithes (*c*) or rates (*d*). There being such dispute, relief has been granted where a part of the land in dispute belonged to a charity, and could not be ascertained without inquiry (*e*). The jurisdiction has been held to extend to the colonies (*f*); but in principle this seems doubtful (*g*).

Owner of rent relieved.

An owner of a rent has been held entitled to equitable assistance, "on usage of payment," where in consequence of the confusion of boundaries or otherwise, the particular lands on which the rent was charged could not be fixed

(*a*) 1 Eden, 331; 2 W. & T. L. C. 405.
(*b*) *Laseelles* v. *Butt*, 2 Ch. D. 588.
(*c*) *Atkins* v. *Hatton*, 2 Anst. 386.
(*d*) *St. Luke's* v. *St. Leonard's*, 1 Bro. C. C. 40.
(*e*) *Att.-Gen.* v. *Bowyer*, 5 Ves. 300.
(*f*) *Tulloch* v. *Hartley*, 1 Y. & C. Ch. 114.
(*g*) See *sup.* p. 17.

upon (*h*). But the plaintiff must be able to fix upon some part of the land, and say that it is part of the land sought to be charged (*i*).

Plaintiff must prove defendant's possession and his own title.

II. In order to claim relief, it is necessary for the plaintiff to show that some portion of the land the boundaries of which are alleged to be confused is in the possession of the defendant (*k*). He must also establish, by the admission of the defendant or by evidence, a clear title to some land in the defendant's possession (*l*). He must also show clearly that without the assistance of the Court the boundaries could not be found (*m*), or at least that, failing the assistance of equity, a multiplicity of legal actions would be occasioned (*n*).

There must be equitable ground for relief.

III. The jurisdiction as to the settlement of boundaries has been very jealously limited to cases in which some equity is superinduced by the act of the parties. It is important to inquire, therefore, what acts constitute a sufficient ground for the jurisdiction.

Fraud.

If the confusion has been occasioned not by the negligence of both, but by the fraud of one of the parties, as by his ploughing or digging too near the other, with the intention of obliterating the boundaries, the Court has jurisdiction (*o*).

Confusion caused by tenant.

Where such a relation exists between two parties as that of tenant and landlord, which makes it the duty of the tenant to preserve the boundaries, if he permits them to be destroyed, so that the landlord's land cannot be distinguished from his, and specifically restored, he will be compelled, even in the absence of fraud on his part, to substitute land of equal value; and the land or its value

(*h*) *D. of Leeds* v. *Powell*, 1 Ves. sr. 171.

(*i*) *Mayor, &c. of Basingstoke* v. *Bolton*, 3 Drew. 50, 63.

(*k*) *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 111, 149.

(*l*) *Godfrey* v. *Littel*, 1 Russ. & My. 59; 2 *ib.* 630.

(*m*) *Miller* v. *Warmington*, 1 J. & W. 491.

(*n*) *Bouverie* v. *Prentice*, 1 Bro. C. C. 200.

(*o*) *Bute* v. *Glamorgan Canal Co.*, 1 Ph. 681; *Spike* v. *Harding*, 7 Ch. D. 871.

may be ascertained by commission (*p*). And it seems that the same result would follow if the confusion was occasioned by a tenant for life (*q*). The remedy has been applied in the case of copyholds (*r*). Where a confusion of lands was occasioned by a devisor, and they came into the hands of parties whose duty it was to ascertain the boundaries, a person entitled to part of such lands was allowed to come into equity to establish his claim (*s*).

Relief will be granted not only against a party guilty of such neglect or fraud, but also against all claiming under him, either as volunteers or purchasers with notice (*t*).

(*p*) *Att.-Gen.* v. *Fullerton*, 2 V. & B. 264; *Brown* v. *Wales*, 15 Eq. 142.

(*q*) *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 133.

(*r*) *Searle* v. *Cooke*, 43 Ch. D. 519; 59 L. J. Ch. 259.

(*s*) *Hicks* v. *Hastings*, 3 K. & J. 701.

(*t*) *Att.-Gen.* v. *Stephens*, *sup.*

CHAPTER VI.

SPECIFIC PERFORMANCE.

SECTION I.—PRINCIPLES OF THE JURISDICTION.

I. *Generally.*
II. *Grounds for refusing Relief.*
  1. *From the Nature of the Contract.*
  2. *From the Conduct of the Plaintiff.*
III. *Statutory Modifications of the Jurisdiction.*

General principles of the jurisdiction.

I. THE remedy for a breach of contract at common law is personal only; the sole redress which it affords to a disappointed party is damages. Consequently, as far as the common law remedy is concerned, it is open to a contracting party either to perform the contract or to pay damages, and to choose between these two courses at his pleasure. Equity, on the other hand, has regarded such a remedy as in many cases inadequate; and, deeming a contracting party bound in conscience to do exactly what he has agreed to do, has exercised its authority to compel the *Special Performance* of such agreements.

Remedy at law must be inadequate.

But it is not in every case that equity will thus interfere. The ground of its jurisdiction being the inadequacy of the remedy at law, it follows as a general principle that where damages at law will give a party the full compensation to which he is entitled, and will put him in a position as beneficial to him as if the agreement had been specifically performed, equity will not interfere.

Equity regards the substance, not the form.

The jurisdiction is not, however, dependent upon or affected by the form or character of the contract. It suffices that the transaction in substance amounts to and is intended to be a binding agreement for a specific object. Thus, if a bond with a penalty is made upon condition to convey certain lands upon the payment of a certain price, it will be deemed in equity an agreement to convey the land at all events, and not to be discharged by the purchaser's election to pay the penalty, although it has assumed the form of a condition only (*a*). It suffices that the primary object of the parties is the transfer of the property, and if that requires specific performance, the penalty will be regarded only as a security for its attainment (*b*).

The jurisdiction is discretionary.

Further, the exercise of the jurisdiction of equity to grant specific performance is always discretionary. The mere fact that the legal remedy is not adequate relief for the breach of a contract is not in itself sufficient to give to a plaintiff a claim as of right to the assistance of a Court of equity. The Court will always look at all the facts of the case, and will direct or refuse its action accordingly; and it may well be that something in the circumstances of the case, or in the position or conduct of the parties, will prevent the granting of the relief where the nature of the agreement would seem to afford good ground for seeking it.

General grounds of refusing specific performance.

II. Before proceeding, therefore, to particularly examine the operation of the doctrine of specific performance, it will be convenient to inquire what are the circumstances which will, on general grounds, induce equity to refuse its assistance. These circumstances relate either to the nature of the contract or to the conduct of the parties.

1. *From the nature of the contract.*

Agreement must be legal.

(1.) The agreement must be a legal one.

There is clearly no jurisdiction in equity to enforce an

(*a*) *French* v. *Macale*, 2 Dr. & W. 269, 274, *sup.* p. 248.
(*b*) Story, 715.

agreement which the law will not recognise at all. It is, as we shall see, often a ground for equitable relief that there is no remedy at law owing to the neglect of some formal provision, such as the writing or signature of a party, while nevertheless the circumstances are such as to render it inequitable for the party to avail himself of such a defence, and thus to refuse performance. But it is obvious that the neglect of such a legal provision cannot make a contract any better than it would have been if that provision had been complied with. Thus, though the Court will in some cases enforce parol arrangements in the nature of a trust, it cannot do so when the trust or understanding is designed to compass what is illegal—as, for instance, to hold land for the purposes of a charity in evasion of the Mortmain Acts (*c*), or agreements in restraint of trade (*d*). Nor will it enforce an agreement which would result in the commission of a fraud, or which calls upon a man to do what he is not competent to do (*e*), still less an immoral agreement. Where a contract has been divisible, part being legal and part illegal or impracticable (*f*), the legal part has been enforced (*g*). Specific performance has been refused when to enforce it would be to compel the defendant to commit a breach of a prior agreement with another person (*h*), and where performance would give rise to a fraud on the public (*i*).

On good consideration.

(2.) On the same principle, an agreement without consideration cannot be enforced—as, for instance, where a person by voluntary settlement covenants to convey lands, and afterwards refuses to do so, or disposes of the lands otherwise by his will (*k*). Here, again, none of the circumstances which constitute a claim upon equity for assistance

(*c*) *Stickland* v. *Aldridge*, 9 Ves. 516.

(*d*) *Sup.* p. 195.

(*e*) *Harnett* v. *Yeilding*, 2 S. & L. 549.

(*f*) *Wilkinson* v. *Clements*, 8 Ch. 96.

(*g*) *Odessa, &c. Co.* v. *Mendel*, 8 Ch. D. 235.

(*h*) *Willmott* v. *Barber*, 15 Ch. D. 96.

(*i*) *Post* v. *Marsh*, 16 Ch. D. 395; 50 L. J. Ch. 287.

(*k*) *Jefferys* v. *J.*, Cr. & Ph. 138, 141.

can make the agreement any stronger than it would have been at law.

Complete, and not ambiguous.

(3.) There must be a completed agreement, and the terms of it must be certain and unambiguous (*l*). But in some cases where the evidence was in some respects contradictory, the Court has decreed performance, at the same time directing inquiries to ascertain the precise terms about which the parties differed (*m*); and it is not necessary to prove terms which are immaterial—*e.g.*, an agreement to do an act which has been already done, or which would be enforceable apart from such stipulation (*n*).

Reasonable, and not prejudicial to third persons.

(4.) Equity will not interfere to assist a contract which is unreasonable or prejudicial to third parties interested in the property (*o*), and though mere inadequacy of consideration is not of itself a sufficient ground for refusing specific performance (*p*), equity has refused to enforce where to do so would work great hardship on the defendant (*q*), or would cause a forfeiture (*r*), and also where there were depreciatory conditions in a sale by trustees (*s*); but in general if hardship is made a ground of defence, it ought to be proved that it existed at the date of the contract (*t*).

Not productive of future litigation.

(5.) A contract will not be enforced when future litigation is likely to result from its performance—for instance, forcing a doubtful title, or even what is called "a good holding title" (*u*) upon a purchaser (*x*), or where there

(*l*) *Swaisland* v. *Dearsley*, 29 Beav. 430; *Tatham* v. *Platt*, 9 Ha. 660; *Taylor* v. *Portington*, 7 De G. M. & G. 328; *Pattle* v. *Hornibrook*, (1897) 1 Ch. 25; 66 L. J. Ch. 144.

(*m*) *Mortimer* v. *Orehard*, 2 Ves. jr. 243; *Chattock* v. *Muller*, 8 Ch. D. 177.

(*n*) *Gregory* v. *Mighell*, 18 Ves. 328.

(*o*) *Thomas* v. *Dering*, 1 Keen, 729; *Beeston* v. *Stutely*, 6 W. R. 206.

(*p*) *Haywood* v. *Cope*, 25 Beav. 140; *Sullivan* v. *Jacob*, 1 Moll. 477.

(*q*) *Wedgwood* v. *Adams*, 6 Beav. 600; 8 Beav. 103; *Watson* v. *Marston*, 4 De G. M. & G. 230.

(*r*) *Peacock* v. *Penson*, 11 Beav. 355.

(*s*) *Dunn* v. *Flood*, 28 Ch. D. 586; 25 *ib.* 629; 54 L. J. Ch. 370.

(*t*) *Webb* v. *L. & P. R. Co.*, 9 Ha. 129.

(*u*) *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778.

(*x*) *Rogers* v. *Waterhouse*, 4 Drew. 329; *Parkin* v. *Thorold*, 16 Beav. 59, 67; *Lawrie* v. *Lees*, 7 App. C. 19; 51 L. J. Ch. 209; *Re Briggs* v. *Spicer*, (1891) 2 Ch. 127; 60 L. J. Ch. 514.

are other conflicting claims likely to harass the purchaser (*y*).

Possible of performance.

(6.) Nor will specific performance be decreed of a contract which it is impossible to perform, or the material terms of which the Court has it not in its power to enforce (*z*); as, for example, a contract involving personal skill, or inclination (*a*).

2. *As to the conduct of the parties.*

The plaintiff must come with clean hands,

(1.) It is a general rule of equity that *a plaintiff must come with clean hands.* The Court will never countenance fraud. If, therefore, a plaintiff has been guilty of any wilful misrepresentation, or fraudulent suppression of the truth, or has put forth misleading particulars or conditions (*b*), he will get no relief (*c*). And if he has obtained the agreement by misrepresentation, he will not be able to get specific performance on waiving the part affected by the misrepresentation, and asking for performance *pro tanto.* Such conduct operates as a personal bar (*d*). But a mere indefinite misrepresentation, such as ought to put a person upon inquiry, will not so operate (*e*). So, also, though suppression of truth may be a bar (*f*), the mere suppression of acts having been done by the plaintiff, when the defendant must have known they were done by somebody, is not sufficient (*g*). So if the plaintiff has induced the defendant to take too much drink, and then taken advantage of him, not only would specific performance be refused, but the contract would be rescinded (*h*);

(*y*) *Pegler* v. *White*, 33 Beav. 403.

(*z*) *Green* v. *Smith*, 1 Atk. 572, 573; *Waring* v. *M. S. & L. R. Co.*, 7 Ha. 483, 492; *Hipgrave* v. *Case*, 28 Ch. D. 356; 54 L. J. Ch. 399.

(*a*) *Lumley* v. *Wagner*, 1 De G. M. & G. 604.

(*b*) *Brewer* v. *Brown*, 28 Ch. D. 309; 54 L. J. Ch. 605; *Re Beyfus and Masters*, 39 Ch. D. 110.

(*c*) *Drysdale* v. *Mace*, 5 De G. M. & G. 103; *Falcke* v. *Gray*, 4 Drew. 651; *Playford* v. *P.*, 4 Ha. 546; *Re Davis and Cavey*, 40 Ch. D. 601; 58 L. J. Ch. 143; *Stewart* v. *Kennedy*, 15 App. C. 75.

(*d*) *Clermont* v. *Tasburgh*, 1 J. & W. 112.

(*e*) *Fenton* v. *Browne*, 14 Ves. 144; *Attwood* v. *Small*, 6 C. & F. 232.

(*f*) *Shirley* v. *Stratton*, 1 Bro. C. C. 440.

(*g*) *Haywood* v. *Cope*, 25 Beav. 140.

(*h*) *Cooke* v. *Clayworth*, 18 Ves. 12.

and if, though the plaintiff were innocent of inducing the defendant to drink, he was so intoxicated as to be incapable of exercising sound judgment, that would alone prevent a decree for specific performance (*i*). Reference may be made to the chapter on Fraud for the fuller analysis of contracts viewed with disfavour in equity on such grounds as are here mentioned. If a contract is such that equity will rescind it as fraudulent, *à fortiori*, it will refuse specific performance.

(2.) *Vigilantibus non dormientibus æquitas subvenit.*

A plaintiff must come within a reasonable time with his demand. *Laches* will disentitle him to assistance (*k*). Especially is this the case when the subject-matter of the contract is an article of fluctuating value; so that delay may greatly change the aspect of the bargain (*l*). and promptly.

III. It will be convenient also here to call attention to certain statutes which have affected the jurisdiction in these matters, particularly the Chancery Amendment Act, 21 & 22 Vict. c. 27, commonly known as Lord Cairns' Act. Statutory modifications of the jurisdiction.

(1.) By this statute, which took effect from and after the 1st of November, 1858, it is enacted that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct. It also provides means Cairns' Act, 21 & 22 Vict. c. 27.

(*i*) *Cragg* v. *Holme*, cited 18 Ves. 14; but see *Lightfoot* v. *Heron*, 3 Y. & C. Ex. 586.

(*k*) *Moore* v. *Blake*, 1 Ball & B. 62; *Smith* v. *Clay*, 3 Bro. C. C. 640; *Eads* v. *Williams*, 4 De G. M. & G. 674, 691; *Levy* v. *Stogdon*, (1899) 1 Ch. 5; 68 L. J. Ch. 19.

(*l*) *Pollard* v. *Clayton*, 4 K. & J. 462.

for the assessment of damages and the trial of questions of fact either by a jury before the Court itself or by the Court alone, or for the assessment of damages by a jury before any judge of one of the Superior Courts of Common Law at *nisi prius*, or before the sheriff of any county or city.

With reference to the construction and application of this Act, the following points seem to be settled:—

Effects of this Act.

(i.) That the statute does not extend the jurisdiction of the Court to cases where there is a plain common law remedy, and where before the statute it would not have interfered (*m*). In other words, the Court could not under the Act award damages save in cases where it had jurisdiction to decree specific performance. It could give damages in lieu of, or in addition to, specific performance; but this ability brought no new matter within the principle of specific performance (*n*).

(ii.) Where, however, the Court has jurisdiction to grant specific performance, it may award damages for non-performance of part of the contract, in respect of which part it could not have enforced specific performance. For example, though, as we shall see, there is no jurisdiction to decree specific performance of a contract to build a house, the remedy at law being complete, yet if a plaintiff asks for specific enforcement of an agreement whereby he undertook to grant and the defendant to take a lease as soon as the defendant should have built a new house on the land, the plaintiff may be awarded damages for the non-building of the house at the same time that he obtains a decree for specific performance of the agreement to accept a lease (*o*).

(iii.) A plaintiff will not be entitled to damages if he

(*m*) *Wicks* v. *Hunt*, Johns. 372, 380.

(*n*) *Rogers* v. *Challis*, 27 Beav. 175; *Lewers* v. *Shaftesbury*, 2 Eq. 270; *Lavery* v. *Purssell*, 39 Ch. D. 508; 57 L. J. Ch. 570.

(*o*) *Soames* v. *Edge*, Johns. 669; *Wilkinson* v. *Clements*, 8 Ch. 96.

has done any act, or has been guilty of any *laches*, which would disentitle him to specific performance (*p*).

(iv.) Though, as a general rule, damages will be awarded only as incidental to granting specific performance or an injunction, yet damages may be given where the evidence is insufficient to procure a mandatory injunction (*q*).

(v.) The power to give damages being discretionary, the Court may refuse to give damages where the question of damages can be more satisfactorily tried at law (*r*).

Lord Cairns' Act has been repealed by 44 & 45 Vict. c. 59, but without prejudice to any jurisdiction or principle or rule of law or equity established or confirmed by it. The above authorities accordingly remain applicable.

(2.) By 25 & 26 Vict. c. 42, the Court of Chancery may, in its discretion, direct an issue to be tried at the assizes or at *nisi prius*, where the circumstances render such a course advisable, and the case is a proper one for equitable relief (*s*). Rolt's Act, 25 & 26 Vict. c. 42.

(3.) By the Judicature Act, 1873 (*t*), s. 34, all causes and matters for the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases, are assigned to the Chancery Division of the High Court of Justice. Judicature Act, 1873.

Having regard to these preliminary matters, we proceed to consider the general operation of the doctrine of specific performance, illustrated by the leading decisions on the subject.

(*p*) *Collins* v. *Stuteley*, 7 W. R. 710; *Martin* v. *Price*, (1894) 1 Ch. 276; 63 L. J. Ch. 209; *Lavery* v. *Purssell*, *sup.*

(*q*) *City of London Brewery* v. *Tennant*, 9 Ch. 212; *Holland* v. *Worley*, 26 Ch. D. 578; 54 L. J. Ch. 268.

(*r*) *Durell* v. *Pritchard*, 1 Ch. 244.

(*s*) *Ibid.*

(*t*) 36 & 37 Vict. c. 66.

Section II.—To what Contracts the Remedy is Applied.

I. *Contracts relating to Land.*
II. *Contracts relating to Personal Chattels.*
1. *General Rule.*
2. *Special Circumstances giving Jurisdiction.*
III. *Contracts respecting Personal Acts.*

I. *Contracts relating to Land.*

General rule in favour of specific performance.

1. It has been said that where a contract in writing respecting real property, in conformity with the Statute of Frauds, is entered into between competent parties, and is, moreover, in its nature and circumstances unobjectionable, it is as much of course for a Court of equity to decree specific performance, as it is for a Court of common law to give damages for the breach of such a contract (*a*), and the fact that the lands in question are situate out of the jurisdiction is no bar to the remedy (*b*).

Defence of Statute of Frauds, *infra*, p. 712.

2. We elsewhere fully discuss the action of the Courts of equity in those cases in which the Statute of Frauds has not been complied with, but in which it is nevertheless deemed equitable to assist the plaintiff; and under this head it therefore now only remains to call attention to certain special circumstances under which the jurisdiction has been appealed to.

(*a*) *Hall* v. *Warren*, 9 Ves. 605, 608.
(*b*) *Penn* v. *Baltimore*, *sup.* p. 16.

Contracts to take lands under statutory powers.

3. Considerable discussion has taken place respecting contracts by railway companies to take lands under the statutory powers conferred upon them; and it is settled that such companies are equally with private individuals amenable to the enforcement of specific performance at the suit of the vendor. This has been put upon the basis of mutuality of remedy: the company being able to compel the transfer, the vendor has on his side a right to insist on the specific performance of the contract (*c*).

Effect of notice to treat.

Where also a railway company has given notice to treat for land, and the price has been fixed by the landowner and the company, or by arbitrators under the Lands Clauses Consolidation Act, the railway company is treated as an ordinary purchaser, and will be compelled in equity to complete the purchase (*d*). So, also, if after notice to treat the company has paid the purchase-money for leaseholds, and has with the consent of the lessee been admitted into possession, it will at the suit of the lessee be compelled to accept an assignment with the usual covenants (*d*).

Agreements for leases and mortgages.

4. Agreements to grant leases or mortgages in consideration of money due are frequently the grounds of suits for specific performance (*e*). But equity will not enforce the granting of a lease, when the lease, if granted, might be determined at once for a breach of a covenant which the plaintiff has already broken (*f*), or where no date is fixed by the contract for the commencement of the term (*g*). And it has refused to enforce an agreement for a yearly tenancy, on the ground of the adequacy of the legal remedy (*h*); but in a recent case, the circumstances were held to justify the enforcement of such a contract (*i*).

(*c*) *Doherty* v. *Waterford and Limerick Railway*, 13 Ir. Eq. 538.
(*d*) *Harvey* v. *Met. R. Co.*, 7 Ch. 154.
(*e*) *Hermann* v. *Hodges*, 16 Eq. 18; *Nicholson* v. *Smith*, 22 Ch. D. 640; 52 L. J. Ch. 191.
(*f*) *Jones* v. *J.*, 12 Ves. 186, 188.
(*g*) *Oxford, M. of* v. *Crow*, (1893) 3 Ch. 535.
(*h*) *Clayton* v. *Illingworth*, 10 Ha. 451.
(*i*) *Lever* v. *Koffler*, (1901) 1 Ch. 543; 70 L. J. Ch. 395.

II. *Contracts relating to Personal Chattels.*

General distinction from contracts respecting land.

1. These are distinguishable from contracts relating to land, not by any difference in the principle on which they are treated, but because from their nature a breach thereof has usually a complete remedy at law.

The leading authority respecting this part of the subject is *Cuddee* v. *Rutter* (*k*).

This was a bill to transfer £1,000 South Sea Stock which the defendant had agreed to transfer at the rate of 104 per cent. Before the time specified for the delivery the stock rose largely in value; the defendant did not deliver the stock, but offered to pay the difference, and so submitted by his answer. Lord Chancellor Parker dismissed the bill on the ground that one £1,000 stock was as good as another, which the plaintiff might have bought of any person on the same day. If the plaintiff, therefore, had accepted payment of the difference from the defendant, he would not have suffered at all by the fact that the agreement was not specifically performed. The case was very different from that of lands of which one parcel could rarely be substituted for another with the same convenience to the purchaser, though it might be of the same market value.

Specific performance only granted in special circumstances.

2. The legal remedy therefore being adequate, there is generally no ground for the exceptional and discretionary interference of equity in contracts respecting personal chattels. Special circumstances may, however, induce the Court to decree specific performance of such contracts; and these may be classed under three heads: firstly, where there is some peculiar difficulty in applying the legal remedy; secondly, where there is some peculiarity in the position of the parties, which gives a special claim for equitable assistance; thirdly, where the jurisdiction arises from the peculiarity of the subject-matter of the contract.

(*k*) 5 Vin. Ab. 538, pl. 21; 1 W. & T. L. C. 848.

(1.) In the following cases, the difficulty of applying the legal remedy was held to give jurisdiction to equity to insist on specific performance.

(1.) Where there is difficulty in applying the legal remedy. *E.g.* in estimating the damages.

In *Taylor* v. *Neville* (*l*) specific performance was decreed of a contract for sale of 800 tons of iron to be delivered and paid for in a certain number of years, and by instalments; Lord Hardwicke stating as the reason of his decision that as the profit upon the contract depended upon future events, it could not be correctly estimated in damages, but a calculation thereof could only proceed upon conjecture.

In *Buxton* v. *Lister* (*m*) Lord Hardwicke put the case of a ship's carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity, and also the case of an owner of land covered with timber contracting to sell the timber in order to clear the land, and assumes that, as damages would not be a complete remedy, specific performance of such contracts would be decreed.

In *Adderley* v. *Dixon* (*n*) specific performance was, at the suit of the vendor, decreed of an agreement to purchase certain debts which had been proved under two commissions of bankruptcy, on the ground that damages at law could not accurately represent the value of the future dividends, and could only be conjectural.

Similar principles have led to the enforcement of contracts for the purchase of annuities (*o*), and of a patent (*p*).

By the Sale of Goods Act, 1893 (*q*), it is now enacted that in any action for breach of contract to deliver specific goods the Court may direct that the contract shall be performed specifically, without giving the defendant the option of paying damages. The reasons which would induce the Court to exercise this statutory discretion are

(*l*) Cited in *Buxton* v. *Lister*, 3 Atk. 384.
(*m*) *Sup.*
(*n*) 1 S. & S. 607.
(*o*) *Clifford* v. *Turrell*, 1 Y. & C. C. 138; *Kenny* v. *Wexham*, 6 Madd. 355.
(*p*) *Cogent* v. *Gibson*, 33 Beav. 557.
(*q*) 56 & 57 Vict. c. 71, s. 52.

doubtless those disclosed by the cases referred to in this chapter.

(2.) Special relation between the parties.

(2.) Jurisdiction is sometimes founded on some special relation between the parties.

Remedy must be mutual.

(i.) Thus, on the ground that the remedy ought to be mutual, a plaintiff is sometimes assisted, when it might have been thought that damages would have completely compensated him. This argument was used in *Adderley* v. *Dixon* (*r*) above quoted, and also in the cases respecting annuities, where the vendor was assisted, though his demand was only for a money payment. The same principle was relied on in the suits against railway companies for the completion of purchases of land, already discussed. And it seems established that where one party to a contract has a right to ask for specific performance, the other party will also be entitled to similar assistance, notwithstanding that a simple money payment would seem to indemnify him.

Trusts.

(ii.) Again, if a trust be created, the circumstance that the subject-matter of the trust is a personal chattel will not prevent the Court from enforcing due execution of the trust, whether against the trustees or persons obtaining possession of the property with notice (*s*).

Principal and agent.

(iii.) The relation of principal and agent and other similar relations have also been held to be sufficient to move a Court of equity where it would otherwise have left the parties to law. Where a fiduciary relation subsists between the parties, whether it be the case of an agent, or a trustee or a broker, or whether the subject-matter be stock or cargoes or chattels of whatever description, the Court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him (*t*).

(3.) Peculiarity of the

(3.) The cases most frequently referred to as illustrating

(*r*) 1 S. & S. 607.

(*s*) *Pooley* v. *Budd*, 14 Beav. 34, 43, 44; *Stanton* v. *Percival*, 5 H. L. 257.

(*t*) *Wood* v. *Rowcliffe*, 2 Ph. 382.

the interference of equity in a transaction respecting chattels on the ground of the peculiarity of the subject-matter of the contract are *Pusey* v. *Pusey* (*u*) and *Somerset* v. *Cookson* (*x*). subject-matter.

In the former of these cases the unique Pusey horn was ordered to be specifically delivered up to the plaintiff, and in the latter a curious Greek altar piece. It is clear that it would be a most insufficient remedy to decree payment of the intrinsic value of such articles as these, which could not at any price be replaced.

(i.) These cases are typical of one division of this class. Heirlooms, and chattels of unique character, may evidently be said to partake of the quality of land in that they may be of much greater value to one person than to another. Their value to a given person is not estimable in damages (*y*). Within the same principle have been included pictures and other works of art (*z*). But where by the terms of the agreement and the frame of the pleadings, the plaintiff, seeking restitution of a picture had in effect put a fixed price upon it, it was held that damages would be an adequate remedy, and equity refused to interfere (*z*). Heirlooms, &c.

(ii.) On the same principle, the Court will order the delivery up of specific deeds and writings to the persons legally entitled thereto (*a*). Deeds and writings.

In suits of this nature it is not necessary in equity, as it was in law, to prove conversion or resistance to deliver them up when sought to be recovered (*b*).

(iii.) More numerous are the cases which have arisen out of contracts for the sale of shares in railways and joint stock companies. In *Duncuft* v. *Albrecht* (*c*), a distinction was drawn between railway shares and public stock, the Sale of shares in companies.

(*u*) 1 Vern. 273; 1 W. & T. L. C. 890.

(*x*) 3 P. Wms. 389; 1 W. & T. L. C. 891.

(*y*) *Fells* v. *Read*, 3 Ves. 70.

(*z*) *Falcke* v. *Gray*, 4 Drew. 651, 658; *Dowling* v. *Betjemann*, 2 J. & H. 544.

(*a*) *Brown* v. *B.*, 1 Dick. 62; *Jackson* v. *Butler*, 2 Atk. 306; *Reece* v. *Trye*, 1 De G. & Sm. 273; *Gibson* v. *Ingo*, 6 Hare, 112.

(*b*) *Turner* v. *Letts*, 20 Beav. 185, 191.

(*c*) 12 Sim. 189.

former being limited in number, and not always obtainable (*d*). Shares in a joint stock company have been similarly dealt with (*e*); and it was considered no bar to the jurisdiction that by the deed of settlement shareholders could only transfer their shares in such a manner as the directors should approve.

Agreements to accept shares.

An agreement to accept shares in a joint stock company may be specifically enforced in equity, if the directors are prompt in instituting proceedings for that purpose (*f*); and in the absence of deception it is no objection that a call has been made on the shareholders, of which the purchaser had no notice (*g*). *Secus* if the purchase was made, or even the money paid and a transfer executed in ignorance that a winding-up petition had been presented (*h*).

Ships.

(iv.) The Acts for the regulation of British shipping (*i*) have modified the action of equity as to the contracts respecting British ships. As, under the operation of the Acts, there can be no transfer in equity which is not a transfer at law, equity will not enforce a contract for the purchase of a British ship or of shares therein (*k*). The Court has jurisdiction to compel a foreigner to specifically perform a contract for sale of a foreign ship (*l*).

Goodwill of business.

(v.) Where the goodwill of a business is altogether or principally annexed to the premises on which it is carried on, a contract for the sale of the goodwill and premises may be enforced in equity (*m*); but the Court will not decree specific performance of a contract for the sale of the goodwill of a business unconnected with the premises (*n*).

Sales at a valuation.

(vi.) We may here conveniently treat of contracts for sale at a price to be determined by arbitration or valuation.

(*d*) *Shaw* v. *Fisher*, 2 De G. & Sm. 11.
(*e*) *Poole* v. *Middleton*, 29 Beav. 646.
(*f*) *New Brunswick, &c. Co.* v. *Muggeridge*, 4 Drew. 686; *Oriental, &c. Co.* v. *Briggs*, 2 J. & H. 625.
(*g*) *Hawkins* v. *Maltby*, 3 Ch. 188; 4 Ch. 200, 202.
(*h*) *Emmerson's Case*, 1 Ch. 433.
(*i*) 8 & 9 Vict. c. 89; 17 & 18 Vict. c. 104.
(*k*) *Hughes* v. *Morris*, 2 De G. M. & G. 349.
(*l*) *Hart* v. *Herwig*, 8 Ch. 860.
(*m*) *Cruttwell* v. *Lye*, 17 Ves. 335.
(*n*) *Baxter* v. *Conolly*, 1 J. & W. 576.

In these cases, unless the price be fixed in the manner determined upon so as to be made part of the agreement, specific performance will not usually be decreed (*o*). But if the vendor refuses to allow a valuer to enter to make a valuation, the Court will make a mandatory order to compel the vendor to allow him to enter, and to enable the valuation to proceed (*p*). And where the fixing of the value by arbitrators is not of the essence of the agreement, the Court will carry the agreement into effect, and will itself, if necessary, ascertain the value (*q*).

III. *Contracts relating to Personal Acts.*

Acts relating to land.

1. Of these we will consider first, as being of a somewhat special nature, contracts to perform certain acts relating to land, such as contracts to build or repair.

Contracts to build or repair not generally enforced.

As a general rule, such contracts will not be specifically enforced (*r*). In the first place, the legal remedy is usually sufficient; secondly, it would be almost impossible for the Court to carry out its decree if made (*s*). Where the agreement to build or repair is incidental to a contract of which the specific performance would be ordinarily decreed, such as a contract to grant a lease, the Court will decree specific performance as regards the lease, and at the same time, if necessary, direct an inquiry as to damages under Lord Cairns' Act, as above described (*t*).

Exceptions.

Nevertheless, the Court has jurisdiction to decree performance of certain works, where damages would not be an adequate remedy. Thus, a railway company has been decreed to construct and maintain an archway under an

(*o*) *Milnes* v. *Gery*, 14 Ves. 400; *Richardson* v. *Smith*, 5 Ch. 648.
(*p*) *Smith* v. *Peters*, 20 Eq. 511.
(*q*) *Dinham* v. *Bradford*, 5 Ch. 519.
(*r*) *Errington* v. *Aynesley*, 2 Bro. C. C. 341.
(*s*) *Brace* v. *Wehnert*, 25 Beav. 348; *S. W. R. Co.* v. *Wythes*, 1 K. & J. 186.
(*t*) *Middleton* v. *Greenwood*, 2 De G. J. & S. 142.

embankment which traversed the plaintiff's property (*u*). In this and other similar cases, one motive which induces equity to relieve is the inability of the plaintiff to enter on the land to do the work at his own cost, and so to ascertain the damages sustained by non-performance (*x*). Again, where there have been acts amounting to part performance of the contract, the Court will decree specific performance which it might otherwise have refused (*y*).

Modern tendency in favour of granting relief.

The general tendency of modern decisions is towards granting the relief thus sought if possible (*z*). Hence it has been held no defence to an action against a railway company that specific performance would occasion great inconvenience to the public (*a*), or that the contract was *ultra vires*, or that the Attorney-General was a necessary party, as representative of the public (*b*).

As to partnership.

2. Passing now from contracts for works on land, we note that Courts of equity will not, as a rule, decree specific performance of an agreement to enter into and carry on a partnership (*c*). This rule has been sometimes departed from; for instance, where the agreement was for a partnership for a fixed and definite time, and there had been a part performance (*d*); but to warrant it the circumstances must be strong (*e*).

Hiring and service.

3. Again, as contracts of hiring and service are of a confidential character, and cannot, therefore, advantageously be enforced against an unwilling party, equity now refuses to decree specific performance of them (*f*). The same remark applies to the contract of agency (*g*).

(*u*) *Storer* v. *G. W. R. Co.*, 2 Y. & C. C. C. 48.
(*x*) *South Wales R. Co.* v. *Wythes*, 1 K. & J. 186, 200.
(*y*) *Price* v. *Corp. of Penzance*, 4 Ha. 506, 509.
(*z*) *Wilson* v. *Furness R. Co.*, 9 Eq. 28, 33.
(*a*) *Raphael* v. *T. V. R. Co.*, 2 Ch. 147.
(*b*) *Wilson* v. *Furness R. Co.*, *sup.*
(*c*) *Scott* v. *Rayment*, 7 Eq. 112.
(*d*) *Anon.*, 2 Ves. sen. 629; *England* v. *Curling*, 8 Beav. 129.
(*e*) *Downs* v. *Collins*, 6 Ha. 418, 437.
(*f*) *Johnson* v. *S. & B. R. Co.*, 3 De G. M. & G. 914; *Ryan* v. *Mutual Tontine, &c. Assoc.*, (1892) 1 Ch. 427; (1893) 1 Ch. 116; 62 L. J. Ch. 252; *Whitwood* v. *Hardman*, (1891) 2 Ch. 416; 60 L. J. Ch. 428.
(*g*) *Chinnock* v. *Sainsbury*, 30 L. J. N. S. Ch. 409.

Separation of husband and wife.

4. On special grounds, agreements for separation of husband and wife, with the execution of the necessary deeds, will be enforced, provided there be a good consideration to support the contract; as, for instance, a compromise of a divorce suit (*h*), a covenant by trustees to indemnify the husband against the wife's debts (*i*), or the wife's acceptance of maintenance from her husband instead of proceeding against him for divorce (*k*).

Agreements to refer to arbitration.

5. It was not the practice for Courts of equity to decree the specific performance of a covenant to refer disputes to arbitration (*l*), unless the agreement to submit contained a covenant not to take proceedings at law or in equity. But now, where there is in a contract an agreement to refer matters in dispute to arbitration under the Common Law Procedure Act (*m*), and more particularly since the Arbitration Act, 1889 (*n*), the Court is strongly disposed to enforce such agreements, by ordering a stay of proceedings in the action (*o*). But where fraud is charged, and a *primâ facie* case disclosed, the Court will usually refuse to stay proceedings (*p*). In any case the Court retains jurisdiction to vary or discharge the order on good cause shown, or an objection may be raised in an action on the award (*q*). Cases arising under the arbitration clauses in Building Societies Acts rest on quite other grounds (*r*).

Awards.

The Court will decree specific performance of an award,

(*h*) *Hart* v. *H.*, 18 Ch. D. 670; 50 L. J. Ch. 697; *Besant* v. *Wood*, 12 Ch. D. 605; *Cahill* v. *C.*, 8 App. C. 420.

(*i*) *Gibbs* v. *Harding*, 5 Ch. 336; *Wilson* v. *W.*, 1 H. L. 538; 5 H. L. 40.

(*k*) *Hobbs* v. *Hull*, 1 Cox, 445.

(*l*) *Street* v. *Digby*, 6 Ves. 815; *Cooke* v. *C.*, 4 Eq. 77; *Halfhide* v. *Fenning*, 2 Bro. C. C. 336.

(*m*) 17 & 18 Vict. c. 125.

(*n*) 52 & 53 Vict. c. 49, s. 4.

(*o*) *Seligmann* v. *De Boutillier*, L. R. 1 C. P. 681; *Willesford* v. *Watson*, 14 Eq. 572; *Clegg* v. *C.*, 44 Ch. D. 200; 59 L. J. Ch. 520; *Ives* v. *Willans*, (1894) 2 Ch. 478; 64 L. J. Ch. 621; *Vawdrey* v. *Simpson*, (1896) 1 Ch. 166; 65 L. J. Ch. 369.

(*p*) *Russell* v. *R.*, 14 Ch. D. 471.

(*q*) *Brierley Hill Local Board* v. *Pearsall*, 9 App. C. 595; 54 L. J. Q. B. 25; *Lyon* v. *Johnson*, 40 Ch. D. 579; 58 L. J. Ch. 626.

(*r*) See *Hack* v. *Lond. Provident, &c. Soc.*, 23 Ch. D. 103; 52 L. J. Ch. 541; *Municipal, &c. Soc.* v. *Kent*, 9 App. C. 260; 53 L. J. Q. B. 290.

where it is to do anything *in specie*, as to convey an estate or assign securities (*s*), and generally the Arbitration Act, 1889 (*t*), enacts that an award may by leave of the Court be enforced in the same manner as a judgment or order to the same effect.

Borrowing and lending.

6. A Court of equity will not specifically enforce a contract to lend (*u*), nor a contract to borrow (*x*), or to pay money (*y*); and this applies to a contract to lend money to a company on the security of debentures. The remedy in such cases lies in damages only (*z*). But specific performance of an agreement to execute a mortgage in consideration of money due has been decreed (*a*), and also of an agreement by parol to execute a bill of sale of personal chattels to secure the plaintiff against certain liabilities (*b*). A promise to make a settlement in consideration of marriage will be enforced (*c*).

Agreement for mortgage, or settlement.

Negative contracts, how enforced.

7. Where a person has entered into a contract not to do a thing, specific performance of such a negative contract takes the form of an injunction. Thus, the ringing of a bell (*d*), carrying on a trade (*e*), acting on the stage (*f*), erecting buildings (*g*), making applications to Parliament (*h*), and various other acts have been restrained, where they have been contrary to agreement. But the Court will not compel by injunction the doing of something which involves continuous employment for an in-

(*s*) *Norton* v. *Mascall*, 2 Vern. 24.
(*t*) 52 & 53 Vict. c. 49, s. 12.
(*u*) *Sichel* v. *Mosenthal*, 30 Beav. 371.
(*x*) *Rogers* v. *Challis*, 27 Beav. 175.
(*y*) *Crampton* v. *The Varna R. Co.*, 7 Ch. 562.
(*z*) *South African Territories* v. *Wallington*, (1898) A. C. 309, affirming (1897) 1 Q. B. 692; 67 L. J. Q. B. 470.
(*a*) *Ashton* v. *Corrigan*, 13 Eq. 76; *Hermann* v. *Hodges*, 16 Eq. 18.
(*b*) *Taylor* v. *Eckersley*, 2 Ch. D. 302; 5 Ch. D. 740.
(*c*) *Coverdale* v. *Eastwood*, 15 Eq. 121; and see *Synge* v. *S.*, (1894) 1 Q. B. 466; 63 L. J. Q. B. 202.
(*d*) *Martin* v. *Nutkin*, 2 P. Wms. 266.
(*e*) *Barret* v. *Blagrave*, 5 Ves. 555.
(*f*) *Lumley* v. *Wagner*, 1 De G. M. & G. 604; *Grimston* v. *Cuningham*, (1894) 1 Q. B. 125.
(*g*) *Rankin* v. *Huskisson*, 4 Sim. 13.
(*h*) *Ware* v. *Grand Junction Co.*, 2 Russ. & My. 470; *Exp. Hartridge*, 5 Ch. 671.

definite period, inasmuch as the Court could not effectively enforce its own order in such circumstances (*i*). It will not usually restrain the doing of an act which is merely ancillary to an agreement of which it cannot compel specific performance (*j*); but where a contract for a sale of chattels contained an express negative stipulation that the vendor would not sell to any other person than the purchaser, the Court restrained the vendor from so selling, although the contract was one of which specific performance would not have been decreed (*k*).

(*i*) *Powell, &c. Co.* v. *Taff R. Co.*, 9 Ch. 331; *Ryan* v. *Mutual Tontine, &c. Assoc.*, (1893) 1 Ch. 116; 62 L. J. Ch. 252.

(*j*) *Merchants' Co.* v. *Banner*, 12 Eq. 18; *Davis* v. *Foreman*, (1894) 3 Ch. 654; 64 L. J. Ch. 187.

(*k*) *Donnell* v. *Bennett*, 22 Ch. D. 835; 52 L. J. Ch. 414; *Lybbe* v. *Hart*, 29 Ch. D. 8; 54 L. J. Ch. 860; and see *Clegg* v. *Hands*, 44 Ch. D. 503; 59 L. J. Ch. 477.

Section III.—Defence of the Statute of Frauds.

I. *Part Performance.*
II. *Other Grounds for Relief.*
III. *Evidence as to Parol Variations.*

In discussing in the last section the general principles by which equity was guided in dealing with claims for specific performance, we postponed for separate examination that extensive class of cases arising from contracts respecting land in which a non-compliance with the Statute of Frauds is set up as an objection to the interference of equity. To this we now revert.

Statute of Frauds, 29 Car. II. c. 3, s. 4.

The Statute of Frauds (*a*) enacts that "no action shall "be brought upon any contract or sale of lands, tenements, "or hereditaments, or any interest in or concerning them, "unless the agreement upon which such action shall be "brought, or some memorandum or note thereof, be in "writing, and signed by the party to be charged therewith, "or some other person thereunto by him lawfully autho- "rised." Notwithstanding this enactment, there are many cases in which, though the Courts of common law would not have assisted the plaintiff, equity has interfered out of its regard for considerations which the common law refused to recognize. This has been especially the case where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing signed according to the statute, as a bar to the relief. The principle on which these cases rest

(*a*) 29 Car. II. c. 3, s. 4.

is that even an Act of Parliament shall not be used as an instrument of fraud (*b*). The Court does not, indeed, affect to set aside the Act of Parliament, but it fastens on the individual who seeks against conscience to avail himself of it, and imposes on him a personal obligation.

Statute may not be used as an instrument of fraud.

Before proceeding to consider the circumstances in which it has been deemed inequitable to permit the statute to be pleaded in defence, it is desirable briefly to review a number of cases which turn upon the interpretation of the statute itself, and in which there has been much discussion as to what terms need to be expressed in the memorandum which the statute requires, or otherwise what documents will suffice to constitute such a memorandum. This is in effect a branch of the general law of contracts, and scarcely calls for detailed consideration in this work. Reference may be made to the exposition of the subject contained in Pollock on Contracts (pp. 1—48, ed. 6). A brief summary of the case law must here suffice.

A formal contract in terms is not necessary, provided that there is evidence of a completed agreement between the parties, a definite proposal on the one side, and a plain unconditional acceptance on the other. And, of course, a valid contract may be constituted by duly authorised agents (*c*).

Thus the statute will be satisfied with a contract deduced from correspondence between the parties, and this notwithstanding that the same discloses that the agreed terms were intended to be embodied in a formal instrument (*d*). But in judging as to the existence of a completed contract under such circumstances, the whole of the correspondence must be considered. You may not draw the line at one point in

Contract expressed in correspondence.

(*b*) *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196; 66 L. J. Ch. 74.

(*c*) *Griffiths, &c. Corp.* v. *Humber & Co.*, (1899) 2 Q. B. 414; 68 L. J. Q. B. 959; *Smith* v. *Webster*, 3 Ch. D. 49; 45 L. J. Ch. 528; *Sims* v. *Landrey*, (1894) 2 Ch. 318; 63 L. J. Ch. 535; *Bell* v. *Balls*, (1897) 1 Ch. 663; 66 L. J. Ch. 397.

(*d*) *Rossiter* v. *Miller*, 3 App. C. 1124; 5 Ch. D. 648; *Bonnewell* v. *Jenkins*, 8 Ch. D. 70; *Filby* v. *Hounsell*, (1896) 2 Ch. 737; 65 L. J. Ch. 852.

the negotiation at which the *consensus* appears to be complete, and disregard conditional terms introduced at a later time (*e*). Two or more documents may be read together for the purpose of deducing a contract, although they do not refer to one another, if it appears that they refer to the same parol agreement (*f*). Even a verbal acceptance of a written and signed offer has been held to constitute an enforceable contract against the writer (*g*).

Contents of the memorandum.

There must of course be an identification on the memorandum of the property affected, though a particular description is not required, and the memorandum for this purpose is read with due regard to the circumstances of the sale (*h*); and if the identification though not clear on the memorandum is capable of being ascertained it is sufficient (*i*). Similarly, the parties must be identified, though not mentioned by name (*k*), and the time at which the purchase is to be completed must be determined (*l*). The appearance of any condition in the acceptance suspends its operation as a contract until it is assented to (*m*).

I. *Part Performance.*

Ground of interference.

The majority of the cases, in which relief is granted on the grounds above mentioned, are deemed to be taken out

(*e*) *Hussey* v. *Horne-Payne*, 4 App. C. 311; *Jervis* v. *Berridge*, 8 Ch. 351; *Bristol, &c. Co.* v. *Maggs*, 44 Ch. D. 616; 59 L. J. Ch. 472; *Jones* v. *Daniel*, (1894) 2 Ch. 332; 63 L. J. Ch. 562.

(*f*) *Studds* v. *Watson*, 28 Ch. D. 305; 54 L. J. Ch. 626; *Oliver* v. *Hunting*, 44 Ch. D. 205; 59 L. J. Ch. 255; *Bellamy* v. *Debenham*, 45 Ch. D. 481; (1891) 1 Ch. 412; 60 L. J. Ch. 166; *Pearce* v. *Gardner*, (1897) 1 Q. B. 688; 66 L. J. Q. B. 457.

(*g*) *Lever* v. *Koffler*, (1901) 1 Ch. 543; 70 L. J. Ch. 395.

(*h*) *Shardlow* v. *Cotterill*, 20 Ch. D. 90; 51 L. J. Ch. 353; *Chattock* v. *Muller*, 8 Ch. D. 177.

(*i*) *North* v. *Percival*, (1898) 2 Ch. 128; 67 L. J. Ch. 321; *Plant* v. *Bourne*, (1897) 2 Ch. 281; 66 L. J. Ch. 643.

(*k*) *Rossiter* v. *Miller*, 3 App. C. 1124; *Potter* v. *Duffield*, 18 Eq. 4; *Coombs* v. *Wilkes*, (1891) 3 Ch. 77; 61 L. J. Ch. 42; *Carr* v. *Lynch*, (1900) 1 Ch. 613; 69 L. J. Ch. 345.

(*l*) *May* v. *Thompson*, 20 Ch. D. 705; 51 L. J. Ch. 917.

(*m*) *Williams* v. *Brisco*, 22 Ch. D. 441; *Hussey* v. *Horne-Payne*, *sup.*

of the statute by the fact that the agreement on which they rest has been in part performed by the plaintiff. Among them a leading authority is *Lester* v. *Foxcroft* (*n*), in which specific performance of a verbal agreement to grant a lease was decreed, notwithstanding the Statute of Frauds, on the ground that in reliance thereon the lessee had incurred considerable expense and trouble in pulling down an old house and building new ones according to the terms of the agreement, it being considered against conscience under such circumstances for the defendant to plead the statute. Part performance.

The inquiry is thus suggested as to what circumstances are considered by equity sufficient to render it against conscience to allow the Statute of Frauds to stand as a bar to the relief sought, and particularly as to the effect of part performance.

1. The equity of part performance only applies to contracts respecting land. Thus, it does not affect other contracts within the statute: *e.g.*, a contract not to be performed within a year (*o*). And specific performance will not be decreed of an agreement to leave money by will (*p*). A contract to acquire an easement has been held to be within the doctrine (*q*). Doctrine only concerns contracts respecting land.

2. The acts alleged as amounting to part performance must be such as are not only referable to the alleged agreement, but such as are referable to no other title. And, again, they must be acts so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement of which they are part execution. Acts must be referable to the agreement.

Thus acts merely introductory or ancillary to an agreement, although attended with expense, are not considered acts of part performance. Under this head are Not merely introductory or ancillary.

(*n*) 1 Colles. P. C. 108; 1 W. & T. L. C. 828.

(*o*) *Brittain* v. *Rossiter*, 11 Q. B. D. 123; 48 L. J. Q. B. 362; *Re Whitehead*, 14 Q. B. D. 419; 54 L. J. Q. B. 88.

(*p*) *Maddison* v. *Alderson*, 8 App. C. 467; 52 L. J. Q. B. 737; *Caton* v. *C.*, L. R. 2 H. L. 127.

(*q*) *McManus* v. *Cooke*, 35 Ch. D. 681; 56 L. J. Ch. 682.

included the delivery of abstracts of title, giving orders for conveyances to be drawn and engrossed, going to view an estate, employing surveyors to value timber on an estate, or appraisers to value stock or land, registering deeds, and similar acts of an equivocal or preparatory nature, which will not suffice to take a case out of the statute (*r*).

Part payment not sufficient.

3. Part payment, or even entire payment of the purchase-money, is not sufficient to entitle to relief. Here the legal remedy would be quite adequate, return of the money, with interest, being a complete redress (*s*).

Possession, when sufficient.

4. Whether or not admission into the possession of an estate will be considered part performance depends on circumstances. If it has unequivocal reference to the contract, it is sufficient. That a stranger should be found in acknowledged possession of the land of another is strong evidence of an antecedent agreement, and is usually sufficient to warrant an application for relief in equity (*t*); *à fortiori* where, in addition to possession, the plaintiff has laid out money on the land (*u*).

When not so.

On the other hand, if the possession can be reasonably accounted for apart from the alleged contract, it will not suffice; for instance, if in a suit for the specific performance of an alleged agreement for a lease, the tenant was in possession under a previous tenancy, he cannot set up that as a part performance (*x*). Or if a farm tenant from year to year continues in possession, and lays out such moneys as are usual in the ordinary course of husbandry,

(*r*) *Hawkins* v. *Holmes*, 1 P. Wms. 770; *Pembroke* v. *Thorpe*, 3 Swanst. 437, n.; *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559, 566; *Cooth* v. *Jackson*, 6 Ves. 17; *Phillips* v. *Edwards*, 33 Beav. 440.

(*s*) *Clinan* v. *Cooke*, 1 S. & L. 22, 40; *Hughes* v. *Morris*, 2 De G. M. & G. 349, 356; *Humphreys* v. *Green*, 10 Q. B. D. 148; 52 L. J. Q. B. 140.

(*t*) *Aylesford's Case*, 2 Str. 783; *Mundy* v. *Jolliffe*, 5 My. & Cr. 167; *Pain* v. *Coombs*, 1 De G. & J. 34, 46; *Hodson* v. *Heuland*, (1896) 2 Ch. 428; 65 L. J. Ch. 754.

(*u*) *Crook* v. *Corp. of Seaford*, 6 Ch. 551.

(*x*) *Wills* v. *Stradling*, 3 Ves. 378.

this is no part performance (*y*). Such continuance in possession, however, if accompanied by payment of an increased rent, referable to the alleged agreement, has been held to be an act of part performance (*z*); and similarly, if, while continuing in possession, he has laid out money, not merely in ordinary acts of husbandry, but in a manner which points to a special agreement (*a*).

Moreover, where the fact of possession is set up as a part performance, it is essential that the possession should have been delivered according to the contract (*b*). It is evident that a wrongful possession could not operate as a title to the consideration of the Court.

Marriage not sufficient.

5. Marriage is not a part performance of an agreement in relation to it, the Statute of Frauds expressly enacting that every agreement made in consideration of marriage must be in writing (*c*). Nevertheless, a contract made in consideration of marriage may be taken out of the statute by acts of part performance independent of the marriage; for instance, by giving up possession of property agreed to be settled (*d*).

Representations connected with marriage.

Again, where a person marries upon faith of representations or promises made to him for the purpose of influencing his conduct with reference to the marriage, the person making such representations or promises will be compelled in equity to make them good, not only at the instance of the person to whom they were made, but also at the instance of the issue of the marriage (*e*). The representation or promise must, however, be clear and absolute (*f*), and the marriage must be distinctly ascribable

(*y*) *Brennan* v. *Bolton*, 2 Dr. & War. 349.

(*z*) *Nunn* v. *Fabian*, 1 Ch. 35; *Miller* v. *Sharp*, (1899) 1 Ch. 622; 68 L. J. Ch. 322.

(*a*) *Mundy* v. *Jolliffe*, *sup.*; *Sutherland* v. *Briggs*, 1 Ha. 26.

(*b*) *Cole* v. *White*, cited 1 Bro. C. C. 409.

(*c*) *Warden* v. *Jones*, 23 Beav. 487; 2 De G. & J. 76; *Caton* v. *C.*, L. R. 2 H. L. 127; *Farina* v. *Fickus*, (1900) 3 Ch. 331; 69 L. J. Ch. 161.

(*d*) *Surcombe* v. *Pinniger*, 3 De G. M. & G. 571; *Ungley* v. *U.*, 5 Ch. D. 887.

(*e*) *Hammersley* v. *De Biel*, 12 C. & F. 45; *Walford* v. *Gray*, 13 W. R. 335, 761.

(*f*) *Randall* v. *Morgan*, 12 Ves. 67.

thereto (*g*). If there is a written agreement after marriage, in pursuance of a previous parol agreement, this takes the case out of the statute (*h*).

On a similar principle, an injunction was granted to restrain the enforcement of a demand, the party seeking to enforce it having, while the marriage treaty was pending, falsely represented to the father of the lady that there was no such demand existing (*i*).

Where the representation is not of an existing fact, but of a mere intention, or where the promisor refuses to bind himself by a contract, giving the party to understand that he must rely upon his honour for the fulfilment of the promise, the Court cannot enforce performance (*k*).

Contracts of companies, &c.

6. Companies and corporations are equally with individuals bound by acts of part performance (*l*). An agreement by a corporation to let land upon lease, although not under seal, will be enforced against the corporation, where there have been acts of part performance on the part of the intended lessee (*m*).

Auctions.

7. Sales of land by auction are generally within the Statute of Frauds. A purchaser, therefore, is not bound unless there is some agreement in writing (*n*).

But if a purchaser takes possession after the sale, and commits acts of ownership, it will be held to be part performance, so as to entitle the vendor to enforce the sale as regards the lots so occupied and dealt with, though not of other lots sold at the same time (*o*). The signature of the auctioneer is sufficient to satisfy the statute, on the ground that he is constituted agent of the purchaser by

(*g*) *Goldicutt* v. *Townsend*, 28 Beav. 445.

(*h*) *Surcombe* v. *Pinniger*, 3 De G. M. & G. 571.

(*i*) *Neville* v. *Wilkinson*, 1 Bro. C. C. 543.

(*k*) *Maunsell* v. *White*, 4 H. L. 1039; *Jordan* v. *Money*, 5 H. L. 185; 15 Beav. 372; 2 De G. M. & G. 318; *Chadwick* v. *Manning*, (1896) A. C. 231; 65 L. J. P. C. 42.

(*l*) *Wilson* v. *W. H. R. Co.*, 34 Beav. 187; 2 De G. J. & Sm. 475.

(*m*) *Crook* v. *Corp. of Seaford*, 6 Ch. 551.

(*n*) *Blagden* v. *Bradbear*, 12 Ves. 466, 472.

(*o*) *Buckmaster* v. *Harrop*, 13 Ves. 456, 474.

the act of bidding (*p*). But in order to this, the auction book must embody, or at least refer to, the conditions of sale (*q*); and the agency must not have been determined before the signature (*r*). The signature of the auctioneer's clerk is, it seems, insufficient (*s*).

Miscellaneous contracts.

It has been said that the doctrine of part performance is not to be extended by the Court, and it was held inapplicable to a case in which a trustee had a power to lease at the request, *in writing*, of a married woman, and such request had not been made (*t*).

A family arrangement for the division of land, although only verbal, has been carried out where there have been acts of part performance by the parties interested, such as holding and dealing with the land in accordance with the terms of the arrangement (*u*).

II. *Other Grounds for Relief.*

Grounds other than part performance.

There are grounds other than part performance, in consideration of which the Court, deeming it inequitable for a defendant to set up the statute as a defence, will decree specific performance.

Fraud of defendant.

1. Where the agreement was intended to have been in writing according to the statute, but this has been prevented from being done by the fraud of the defendant, equity has relieved. Otherwise the statute, designed to suppress fraud, would be used as a protection for it. Thus, if one agreement is fraudulently substituted for another, or if in case of a loan on mortgage, it is agreed that the

(*p*) *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Bird* v. *Boulter*, 4 B. & Ad. 443.

(*q*) *Rishton* v. *Whatmore*, 8 Ch. D. 467; *Sims* v. *Landrey*, (1894) 2 Ch. 318; 63 L. J. Ch. 535.

(*r*) *Bell* v. *Balls*, (1897) 1 Ch. 663; 66 L. J. Ch. 397.

(*s*) *Ibid.*

(*t*) *Phillips* v. *Edwards*, 33 Beav. 440.

(*u*) *Williams* v. *W.*, 2 Dr. & Sm. 378; 2 Ch. 294.

security is to be in the form of an absolute deed by the mortgagor and a defeasance by the mortgagee, and the absolute conveyance being executed, the mortgagee refuses to execute the defeasance, equity will grant relief (*x*).

The principle that a statute shall not be made an instrument for covering a fraud has been illustrated by cases in which equity has not allowed parties to profit where they have fraudulently induced a person to make or refrain from altering a will, the mode of making which was formerly regulated by ss. 5 and 19 of the Statute of Frauds, and is now by the Wills Act (*y*).

Analogous cases under the Wills Act.

Thus, if a person, knowing that a testator in making a disposition in his favour intends it to be applied for purposes other than his benefit, expressly promises, or by silence implies, that he will carry the testator's intentions into effect, and the property is left to him upon faith of that promise or undertaking, it is in effect a trust, and the devisee will not be allowed to shelter himself behind the Wills Act (*z*). It would be otherwise if the omission to declare the trust according to the statute arose from the neglect or error of the testator uninfluenced by the devisee (*a*). But *quære* whether the heir could claim on the ground of an absence of intention to benefit the devisee (*b*). The same principle applies to a case where property has been suffered to descend owing to similar representations made by the heir (*c*).

(*x*) *Joynes* v. *Statham*, 3 Atk. 389; *Lincoln* v. *Wright*, 4 De G. & J. 16; *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196; 66 L. J. Ch. 74.

(*y*) 1 Vict. c. 26.

(*z*) *Jones* v. *Badley*, 3 Ch. 364.

(*a*) *Adlington* v. *Cann*, 3 Atk. 151.

(*b*) *Russell* v. *Jackson*, 10 Ha. 204; *Muckleston* v. *Brown*, 6 Ves. 52; *Rowbotham* v. *Dunnett*, 8 Ch. D. 431.

(*c*) *Stickland* v. *Aldridge*, 9 Ves. 516, 519; *M'Cormick* v. *Grogan*, L. R. 4 H. L. 82, 88.

III. *Evidence of Parol Variations.*

Evidence as to parol variations in the contract.

The consideration of the effect of the Statute of Frauds in suits for specific performance cannot be dismissed without reference to the important class of cases which have turned upon the question of the admissibility of parol evidence of alleged variations from the written agreement.

Generally not admissible to support a claim for specific performance; but admissible in defence.

The leading principle which guides the Court in deciding this question cannot be better illustrated than by reference to the case of *Townshend* v. *Stangroom* (*d*).

There a lessor filed a bill for specific performance of a written agreement for a lease, alleging a parol variation as to the quantity of land included; and the lessee filed a cross-bill for specific performance of the agreement simply as written. Lord Eldon dismissed both bills; the lessor's, because parol evidence *was not* admissible for him as plaintiff to set up an agreement different from that which was written: the lessee's, because the very same evidence *was* admissible on the part of the lessor by way of defence (*e*).

The rule rests on general principles of law.

1. These cases are conspicuous among many decisions which have well established the difference between the evidence which is available for a plaintiff seeking and a defendant resisting specific performance of a contract. Although the question as to the admissibility of parol evidence is affected by the Statute of Frauds, it does not wholly rest thereon. Independently of the statute, by "the general rules of evidence, writing stands higher in "the scale than mere parol testimony, and when treaties "are reduced to writing such writing is taken to express "the ultimate sense of the parties, and is to speak for "itself. In the case of a contract respecting land, the "general idea receives weight from the circumstance that

(*d*) 6 Ves. 328.
(*e*) See also *Woollam* v. *Hearn*, 7 Ves. 211; 2 W. & T. L. C. 468.

" you cannot contract at all on that subject but in writing; " and this, therefore, is a further reason for rejecting parol " evidence. In this way only is the Statute of Frauds " material, for the foundation and bottom of the objection " is in the general rules of evidence " (*f*).

General illustrations.

The rule, then, is that parol evidence on the part of a plaintiff seeking performance of a written contract, with a variation supported by such evidence, will be rejected, notwithstanding that the difference of the written from the real agreement is the result of fraud, accident, or surprise. Thus, a plaintiff cannot adduce evidence to prove that lands comprised in a written agreement were by parol agreed to be left out of a lease (*g*), nor to prove verbal declarations at an auction in opposition to printed conditions of sale (*h*), nor that a written agreement to sell to two jointly was in reality an agreement to sell to one of them, and that the other was to have some interest in the premises by way of security for such part of the purchase-money as he might advance (*i*), nor in any similar case (*k*).

Exception. Parol variation partly performed.

2. On the principle, however, already explained in connexion with *Lester* v. *Foxcroft*, that part performance will serve the purpose of evidence which is otherwise wanting, it is established that when the alleged parol variation has been partly performed, specific performance of the written agreement with the parol variation will be decreed (*l*). In such cases the parol variation is in fact treated as a new agreement partly performed: and it is considered that such agreement, having been acted upon, cannot be disregarded without injustice (*m*).

When available in defence.

3. It is equally well established that it is open to a defendant in certain circumstances to resist a claim for specific performance by means of parol evidence designed

(*f*) *Davis* v. *Symonds*, 1 Cox, 402.
(*g*) *Lawson* v. *Laude*, 1 Dick. 346.
(*h*) *Jenkinson* v. *Pepys*, cited 1 V. & B. 528.
(*i*) *Davis* v. *Symonds*, *sup.*
(*k*) *Clinan* v. *Cooke*, 1 S. & L. 22, 30.
(*l*) *Anon.*, 5 Vin. Abr. 522, tit. 38; *Legal* v. *Miller*, 2 Ves. sr. 299.
(*m*) *Pitcairn* v. *Osbourne*, 2 Ves. sr. 375.

to show that the real agreement was not that which is represented in the writing, and that its enforcement would be, therefore, inequitable. This is, indeed, no infringement of the statute, which "does not say that a written "agreement shall bind, but that an unwritten agreement "shall not bind" (*n*). For example, in a very recent case it has been held that a clear and distinct statement by an auctioneer at the time of the sale verbally correcting a material misdescription in the particulars disentitle the purchaser to specific performance with compensation for that misdescription, even though he did not hear the statement (*o*).

The circumstances, always of much weight in equity, which entitle a defendant to make use of such evidence, are fraud, mistake, or surprise (*p*).

Where the terms of a written agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the Court has on that ground refused to enforce the agreement (*q*); the author of the ambiguity has even himself had the benefit of this principle (*r*).

But it appears that, in the case of a misunderstanding between the parties, the plaintiff is entitled to waive his contention as to the construction, and to insist on specific performance of the contract as understood by the defendant (*s*). But such a case must be distinguished from those in which the difference between the parties is of such a nature that there is really no contract at all for want of a *consensus ad idem* (*t*). The distinction clearly rests

(*n*) *Clinan* v. *Cooke*, 1 S. & L. 22, 39.

(*o*) *Re Hare and More's Contract*, (1901) 1 Ch. 93; 70 L. J. Ch. 45; following *Manser* v. *Back*, 6 Ha. 443.

(*p*) *Joynes* v. *Statham*, 3 Atk. 388; *Clowes* v. *Higginson*, 1 V. & B. 524; *Manser* v. *Back*, *sup.*

(*q*) *Calverley* v. *Williams*, 1 Ves. 210; *Clowes* v. *Higginson*, *sup.*

(*r*) *Neap* v. *Abbott*, C. P. Coop. 333.

(*s*) *Preston* v. *Luck*, 27 Ch. D. 197.

(*t*) *Marshall* v. *Berridge*, 19 Ch. D. 233; 51 L. J. Ch. 329; *Wilding* v. *Sanderson*, (1897) 2 Ch. 534; 66 L. J. Ch. 684.

on the nature and degree of the difference between the parties.

The admissibility of parol evidence in defence is not confined to matter collateral to and independent of the written agreement, but may amount even to a contradiction of it (*u*).

When not so.

It is not sufficient, however, to entitle the vendor to the benefit of such evidence, that the contract is not precisely such as he expected it to be. A mere unproved suspicion of fraud in the plaintiff (*x*), or a mistake of law, or as to the legal effect of the contract, or the legal consequences of an act (*y*), or a mistake as to the interest which the purchase will enable a person to acquire (*z*), cannot be set up as a defence. And if mistake of fact is alleged it must be clearly proved (*a*). Further, an inadvertent omission to propose an intended term to an agreement (*b*), or its purposed omission, upon the supposition that it was illegal, is not sufficient (*c*).

Mutually dependent contracts.

4. An analogous class of cases is that in which two contracts are alleged by the defendant to be mutually dependent, and he claims to resist the performance of one until the plaintiff performs the other, parol evidence being necessary to connect the two. In *Croome* v. *Lediard* (*d*) such evidence was rejected, and the plaintiff's prayer granted, though the defendant could not make a good title to the estate he wished to sell, and he sought to prove that the whole transaction was intended as an exchange. Lord Brougham rejected the tendered evidence, on the ground that evidence of matter *dehors* the written agree-

(*u*) *Ramsbottom* v. *Gosden*, 1 V. & B. 165; *Winch* v. *Winchester*, *ib.* 375.

(*x*) *Lightfoot* v. *Heron*, 3 Y. & C. Ex. 586; *Wilding* v. *Sanderson*, (1897) 2 Ch. 534.

(*y*) *Cooper* v. *Phibbs*, L. R. 2 H. L. 149; *Powell* v. *Smith*, 14 Eq. 85; *G. W. R.* v. *Cripps*, 5 Ha. 91; *Stewart* v. *Kennedy*, 15 App. C. 108.

(*z*) *Mildmay* v. *Hungerford*, 2 Vern. 243.

(*a*) *Darnley* v. *L. C. & D. R.*, L. R. 2 H. L. 43.

(*b*) *Parker* v. *Taswell*, 2 De G. & J. 559.

(*c*) *Irnham* v. *Child*, 1 Bro. C. C. 92; see also *Cross* v. *Berridge*, 8 Ch. 359.

(*d*) 2 My. & K. 251.

ment was not admissible to alter the terms and substance of the contract: though evidence of matter collateral to it might be received. But Lord St. Leonards, in commenting on the case, has considered that the proper ground was the absence of any proof of fraud, mistake, or surprise (*e*).

Parol waiver.

5. A clearly proved parol waiver of a written contract, amounting to a complete abandonment, will bar specific performance (*f*). And where a written agreement is *subsequently* varied by parol, upon proceedings being taken for specific performance with or without the variation, the Court will, it seems, put the defendant to his election, and if he declines to elect, will decree specific performance of the agreement without the variation (*g*). But it seems that parol evidence of a contemporaneous variation in or addition to an agreement, which was by admission correctly put into writing, is not admissible as a defence to specific performance (*h*).

Subsequent variation.

Contemporaneous variation.

Plaintiff may assent to parol variation.

6. Although it will be a good defence to show that a written agreement does not contain a provision in favour of a defendant verbally agreed upon between the parties, nevertheless, when such a verbal agreement is alleged, the plaintiff may, by submitting to perform the omitted provision, and in the absence of fraud or mistake with reference to it, obtain a decree for performance of the whole contract (*i*). And there are many cases in which the effect of the evidence has been, not to defeat the plaintiff's claim to specific performance, but to lead the Court to perform the contract, taking care that the parol agreement is also carried into effect, so that all the parties may have the benefit of what they contracted for (*k*).

(*e*) Sugd. V. & P. 163, 14th ed.; *Lloyd* v. *L.*, 2 My. & Cr. 192.

(*f*) *Price* v. *Dyer*, 17 Ves. 356; *Pattle* v. *Hornibrook*, (1897) 1 Ch. 25; 66 L. J. Ch. 144.

(*g*) *Robinson* v. *Page*, 3 Russ. 114.

(*h*) *Ormerod* v. *Hardman*, 5 Ves. 722.

(*i*) *Martin* v. *Pycroft*, 2 De G. M. & G. 785; *Preston* v. *Luck*, 27 Ch. D. 497.

(*k*) *Ramsbottom* v. *Gosden*, *sup.*; *L. & B. R. Co.* v. *Winter*, Cr. & Ph. 57; *Smith* v. *Wheatcroft*, 9 Ch. D. 223; *Olley* v. *Fisher*, 34 Ch. D. 367; 56 L. J. Ch. 208.

Section IV.—Specific Performance with a Variation.

Contrast of Law and Equity.

I. *Where the Dispute relates to Time.*
   1. *When Time is essential.*
   2. *When not so.*
   3. *Compensation.*

II. *Where the Dispute relates to Quantity or Quality.*
   1. *In vendors' suits.*
   2. *In purchasers' suits.*

Defences peculiar to suits for specific performance.

Having examined the general principles which determine whether or not a suit for specific performance of a contract will lie in equity, we are now led to consider the force of a peculiar class of defences which may be used in answer to such a claim, and to observe the manner in which equity deals therewith. There is scarcely any branch of the subject of equitable jurisdiction more fertile in illustrations of the contrast between the principles and methods of equity and those which prevailed in the Courts of common law.

In the important case of *Seton* v. *Slade* (*a*), the defendant agreed to purchase certain property from the plaintiff. The memorandum of agreement was signed by him, but not by the plaintiff. One of the terms was that a good title to the property was to be made within two months, and the purchase was to be completed within that time. The abstract of title was only delivered within a few days of the expiration of the two months, but the defendant

(*a*) 7 Ves. 265; 2 W. & T. L. C. 501.

received and retained it without objection until the expiration of the two months. On a bill for specific performance of the agreement, it was held that the defendant could not insist on the time as of the essence of the contract, and specific performance was decreed.

In many respects analogous to this are other cases in which the dispute as to performance rests not upon the question of time, but upon the fact that the vendor has not the same interest in the estate as that which he contracted to sell; or that there is some deficiency in the quantity or quality of it. In such cases a party not able strictly to perform his contract had no remedy at law by way of damages; but in equity he might often obtain specific performance, adequate compensation being allowed for the partial departure from the contract.

At the suggestion, therefore, of this case we may conveniently investigate the general circumstances under which, though the plaintiff cannot strictly carry out his agreement, he will obtain specific performance on allowing compensation.

Application by summons under 37 & 38 Vict. c. 78, s. 9.

This is a fitting place in which to mention a recent useful enactment which has been the means of saving considerable expense in case of disputes such as we are about to consider. By the Vendor and Purchaser Act, 1874 (*b*), it is provided that a vendor or purchaser of real or leasehold estate in England may apply in a summary way to a judge in Chambers in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just.

And in proceedings under this Act, the Court has jurisdiction not only to answer the question submitted, but to give all consequential directions, *e.g.*, it can determine the

(*b*) 37 & 38 Vict. c. 78, s. 9.

question whether a right to rescind has been well exercised (*c*); and may order a return of the deposit with interest when a vendor has failed to make a title (*d*). But the Court has not jurisdiction, in this procedure, to award damages (*e*).

I. *Where the Dispute relates to Time.*

Time formerly essential at law.

Judicature Act, s. 25, sub-s. 7.

In the Courts of law previous to the passing of the Judicature Act of 1873, time was in all cases considered as of the essence of the contract. By that Act, however, it is enacted (*f*) that "stipulations in contracts as to time "or otherwise, which would not before the passing of this "Act have been deemed to be, or to have become, of the "essence of such contracts in a Court of equity, shall "receive in all Courts the same construction and effect as "they would have heretofore received in equity." Equitable principles, therefore, in this as in other matters, now prevail in all the Courts; so that when we speak hereafter of a distinction between the rules of law and equity, we must be understood to refer to the state of things previous to the 1st of November, 1875.

Though, as in the principal case, equity usually considers time to be a circumstance, and not of the essence of a contract, there are other cases in which its treatment is as strict as that of law. It will be well, therefore, to consider these classes of contracts separately; and first, the smaller and exceptional class.

(*c*) *Re Jackson and Woodburn*, 37 Ch. D. 44; 57 L. J. Ch. 243; *Re Lander and Bagley's Contract*, (1892) 3 Ch. 41; 61 L. J. Ch. 707.

(*d*) *Re Hargreaves and Thompson's Contract*, 32 Ch. D. 454; 56 L. J. Ch. 199; and see *Re Bryant and Barningham's Contract*, 44 Ch. D. 218; 59 L. J. Ch. 636; *Re Thompson and Holt's Contract*, 44 Ch. D. 492; 59 L. J. Ch. 651; *Re Scott and Alvarez' Contract*, (1895) 2 Ch. 603; 64 L. J. Ch. 821.

(*e*) *Re Wilson and Stevens*, (1894) 3 Ch. 546; 63 L. J. Ch. 863.

(*f*) Sect. 25, sub-s. 7.

1. *Where time is deemed essential.*

Time, when essential in equity.

Equity is induced to treat time as of the essence of a contract either in consideration of the nature of the property concerned, or on account of the special agreement to that effect of the parties.

(1.) From the nature of the property.

Property of fluctuating value.

(i.) Where the thing is of greater or less value, according to the effluxion of time, such as a reversion, equity requires strict adherence to time. Such contracts are generally occasioned by the vendor's present want of money, and to give him interest thereon during a long delay is no compensation to him (*g*). Within the same principle is included property of an unusually fluctuating value, such as a mining lease, or foreign stock (*h*); or of a wasting character, as a life annuity or leaseholds (*i*).

Mercantile contracts.

(ii.) Equity is disposed to treat mercantile contracts generally with greater strictness than contracts relating to land (*k*). The purpose of the purchase is considered as influencing the construction of the contract: thus, time is insisted on where premises are needed for commercial purposes (*l*), or with a view to immediate residence (*m*), or the money is required for paying off debts of the vendor (*n*). It may be added, that the tendency of modern decisions is to bind parties more strictly to the terms of their agreements. Relief will be refused if the delay has been so great as to indicate an abandonment of the contract (*o*).

Purpose of the purchase.

Sale of public-house.

(iii.) In the absence of express stipulation to the contrary, time is always regarded as essential in the sale of a

(*g*) *Newman* v. *Rogers*, 4 Bro. C. C. 393.

(*h*) *Macbryde* v. *Weeks*, 22 Beav. 533; *Doloret* v. *Rothschild*, 1 S. & S. 590.

(*i*) *Hudson* v. *Temple*, 29 Beav. 536.

(*k*) *Reuter* v. *Sala*, 4 C. P. D. 239.

(*l*) *Walker* v. *Jeffreys*, 1 Ha. 341; *Parker* v. *Frith*, 1 S. & S. 190, n.

(*m*) *Tilley* v. *Thomas*, 3 Ch. 61.

(*n*) *Popham* v. *Eyre*, Lofft, 786.

(*o*) *Levy* v. *Stogdon*, (1899) 1 Ch. 5; 68 L. J. Ch. 19; *sup.*, p. 697.

public-house as a going concern (*p*), and the licence must be transferred promptly (*q*).

Right of pre-emption.

(iv.) An option to purchase under a right of pre-emption is always construed strictly, and must be exercised at the time prescribed (*r*).

By special agreement of the parties.

(2.) **By special agreement of the parties.**

Generally.

(i.) It was at one time held that the parties could not make time of the essence of a contract any more than they could contract themselves out of the operation of the principles of equity as to the redemption of mortgages, or the penalties of bonds; but it is now established that if by the contract it clearly appears to be the intention of the parties, if, for instance, they stipulate that the agreement shall be void unless the purchase be completed on a given day, equity will treat the fixture of time as essential (*s*).

Stipulation must be strict.

It nevertheless requires a strict stipulation to effect that object in contracts relating to the sale of land (*t*). A mere stipulation that an abstract shall be given, or possession delivered on a named day, will not suffice (*u*). A stipulation that time shall be of the essence of the contract with regard to one of the steps towards completion, raises a presumption that it was not intended to be so with regard to others (*x*); and if the contract evidently contemplates an extension of the time beyond the day fixed, as by fixing interest to be thereafter paid upon the purchase-money, time will not be strictly regarded (*y*).

Notice pending negotiations.

Though time be not originally of the essence, yet, where there has been great and unreasonable delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed, and that time will

(*p*) *Day* v. *Luhke*, 5 Eq. 336.

(*q*) See *Tadcaster Brewery* v. *Wilson*, (1897) 1 Ch. 705; 66 L. J. Ch. 402.

(*r*) *Brooke* v. *Garrod*, 3 K. & J. 608; *Dibbins* v. *D.*, (1896) 2 Ch. 348; 65 L. J. Ch. 724.

(*s*) *Hudson* v. *Bartram*, 3 Madd. 440; *Boehm* v. *Wood*, 1 J. & W. 419; *Hudson* v. *Temple*, 29 Beav. 536.

(*t*) *Webb* v. *Hughes*, 10 Eq. 286.

(*u*) *Roberts* v. *Berry*, 3 De G. M. & G. 284; *Tilley* v. *Thomas*, 3 Ch. 61.

(*x*) *Wells* v. *Maxwell*, 32 Beav. 408.

(*y*) *Webb* v. *Hughes*, *sup.*

be regarded and insisted on by equity (*z*). But the notice to be effective must be reasonable (*a*); and if time is not originally of the essence of the contract, it cannot be made so by notice unless there has been some default or unreasonable delay (*b*).

Enlargement of time and waiver.

(ii.) If time has been made of the essence of the contract by agreement, or is considered so by reason of the nature of the property, or becomes so by notice during progress of the transaction, it may be enlarged or waived by subsequent agreement, or by conduct of the parties. Thus, if negotiations go on after the fixed time has passed, it amounts to a waiver (*c*), unless the negotiations were expressly conditioned to be without prejudice to the legal position (*d*). And if, as in *Seton* v. *Slade* (*e*), the purchaser is aware of the objections to the title, or if he receives the abstract after the day appointed, or proceeds with the purchase after the completion of the time fixed, unless, at least, he does so under protest (*f*), he will be held to have waived his right to object to the delay, and will not be able to resist specific performance (*g*). And likewise, if a vendor receives and entertains the requisitions of the purchaser after the time specified, unless he reserves his right he will be deemed to have waived it (*h*). The time within which objections are to be made to a title may, of course, be enlarged by the vendor's consent (*i*).

Ground of rescission.

(iii.) The vendor may, it seems, insist upon the contract being rescinded, where circumstances exist which render it improbable that the purchase-money can be paid for a long time, as the bankruptcy or death of the purchaser,

(*z*) *King* v. *Wilson*, 6 Beav. 126.
(*a*) *Wells* v. *Maxwell*, *sup.*; *Crawford* v. *Toogood*, 13 Ch. D. 153; *Hatten* v. *Russell*, 38 Ch. D. 334; 57 L. J. Ch. 425.
(*b*) *Green* v. *Sevin*, 13 Ch. D. 589; and see as to forfeiture of deposit, p. 247, *sup.*
(*c*) *Boyes* v. *Liddell*, 6 Jur. 725; *Pegg* v. *Wisdon*, 16 Beav. 239.
(*d*) *Tilley* v. *Thomas*, *sup.*
(*e*) *Supra*, p. 726.
(*f*) *Magennis* v. *Fallon*, 2 Moll. 576.
(*g*) *Pincke* v. *Curteis*, 4 Bro. C. C. 329; *Hoggart* v. *Scott*, 1 Russ. & My. 293.
(*h*) *Oakden* v. *Pike*, 11 Jur. N. S. 666.
(*i*) *Cutts* v. *Thodey*, 13 Sim. 206.

and the inability of his representatives to get in assets (*k*), and the omission to require payment of the deposit will not deprive him of his right to insist that the contract be rescinded, where he has taken other sufficient steps for that purpose (*l*).

Mala fides repels usual rule.

(iv.) Although time may be made of the essence of the contract in reference to any matter appearing upon the abstract, as, for instance, in taking objections to the title, an exception from the ordinary rule will arise in such case, and time will not be considered essential for taking such objection, where there has been unfair dealing and a plain want of *bona fides* on the part of the vendor; as where the conditions were so framed as to deceive the purchaser, or throw him off his guard (*m*).

2. *Where time is not deemed an essential.*

Time when not deemed essential.

The delay occasioning the objection will arise either from the conduct of the parties, or from the state of the title.

Where delay arises from conduct of parties generally.

(1.) **From the conduct of the parties.**

(i.) The principal case shows the view taken by Courts of equity as to contracts generally—namely, that the general object being only the sale of an estate for a given sum, the particular day named is merely formal, and that the stipulation means in truth that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case; and, as in the case of mortgages, it acts on the general intention rather than on the particular words of the stipulation. The rule is, then, that it will grant the relief of specific performance, notwithstanding a failure to keep the dates assigned by the contract, if it can do justice to the parties, or if there is nothing in the stipulations between the parties, the

(*k*) *Mackreth* v. *Marlar*, 1 Cox, 259.

(*l*) *Watson* v. *Reid*, 1 Russ. & My. 236.

(*m*) *Boyd* v. *Dickson*, 10 I. R. Eq. 239.

nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. At law the vendor was bound to have his title deeds and abstract ready at the appointed time. In equity it is not solely incumbent upon the vendor to move by making a tender of the abstract, but it is also incumbent upon the purchaser to ask for it at the appointed day, or on such other day as will leave sufficient time for the completion of the contract. Otherwise the time would be considered as waived (*n*). So if the abstract were delivered after the appointed day, and the purchaser made no objection to the delay, he would be considered to have waived it (*o*).

If, however, the vendor does not deliver his abstract promptly, he of course cannot hold his purchaser to send in his objections in the time limited, even though it may have been stipulated that time in that respect should be of the essence of the contract (*p*).

Exceptional cases.

(ii.) Equity, however, does not go so far as to enforce performance on a purchaser when the vendor has taken no steps whatever to complete the contract, and the purchaser has without delay insisted on his deposit and refused to proceed; nor would it have granted an injunction to restrain the purchaser from suing for his deposit at law (*q*). Unreasonable delay will of itself be a bar to either party obtaining a decree. "A party must show himself ready, desirous, prompt, and eager," in calling for the assistance of the Court (*r*), and a continual claim, without any active steps in support of it, will not keep alive a right which would otherwise be barred by *laches* (*s*).

This rule has been relaxed where a strict application of it would work injustice, as where after an agreement for a

(*n*) *Guest* v. *Homfray*, 5 Ves. 818; *Jones* v. *Price*, 3 Anstr. 924.

(*o*) *Smith* v. *Burnam*, 2 Anstr. 527.

(*p*) *Upperton* v. *Nickolson*, 6 Ch. 436.

(*q*) *Lloyd* v. *Collett*, 4 Bro. C. C. 469.

(*r*) *Milward* v. *E. of Thanet*, 5 Ves. 720, n.

(*s*) *Lehmann* v. *McArthur*, 3 Eq. 746; 3 Ch. 496; *Levy* v. *Stogdon*, (1899) 1 Ch. 5; 68 L. J. Ch. 19.

lease the intended lessee had entered into or remained in possession, and no further steps were taken to formally complete the contract until fourteen years had expired (*t*). But the fact that a purchaser has paid part of the purchase-money is not sufficient to entitle him to assistance, if he has lain by and delayed completion for an unreasonable time (*u*). Equity will not countenance parties in delaying matters with a view to see whether the contract will prove advantageous or not, and accordingly either to abandon it, or claim specific performance (*x*). Nor will a purchaser be aided who has taken trifling and vexatious objections to the title, and shown a disinclination to proceed (*y*), or is clearly unable to pay the purchase-money (*z*).

The granting or withholding of specific performance being discretionary, equity has sometimes refused to assist a party who is out of time on the general ground that the contract is inequitable, or the price unreasonable (*a*).

From the nature of the title.

(2.) From the nature of the title.

General rule.

The general rule is, that if a vendor commence an action for specific performance, he is entitled to assistance if he can procure a good title at the time of the decree. It is immaterial that he had not a title when entering into the articles for sale (*b*). It ought, however, generally to be made out in time for the master's certificate, though this has not uniformly been insisted upon (*c*).

Where the objection to the vendor's title is that there is an interest outstanding in a third party, and the purchaser buys up that interest, he can no longer resist

(*t*) *Shepheard* v. *Walker*, 20 Eq. 659.

(*u*) *Harrington* v. *Wheeler*, 4 Ves. 686.

(*x*) *Alley* v. *Deschamps*, 13 Ves. 225.

(*y*) *Hayes* v. *Caryll*, 1 Bro. P. C. 126.

(*z*) *Gee* v. *Pearse*, 2 De G. & Sm. 325; *Aberaman Iron Works* v. *Wickens*, 5 Eq. 485.

(*a*) *Whorwood* v. *Simpson*, 2 Vern. 186.

(*b*) *Langford* v. *Pitt*, 2 P. Wms. 630.

(*c*) *Coffin* v. *Cooper*, 14 Ves. 205.

specific performance on the ground that it is not in the vendor (*d*).

Tendency of modern decisions.

The tendency of decisions is now against the practice of compelling a purchaser to take an estate of which the title is not made out till after the time fixed by the contract, and the purchasers have been allowed the benefit of many slight circumstances in their favour; for instance, that a new suit has become necessary, or that an account of debts remains to be taken in a suit, &c. (*e*).

3. *Compensation.*

Compensation for default in time,

In all cases in which specific performance has been decreed notwithstanding discrepancy in time or in substance of the contract, care has been taken that proper compensation should be made, and the parties in fact put in the same situation as if the contract had been strictly fulfilled.

how calculated.

Ordinarily a purchaser is entitled to the profits of the estate from the time at which the contract ought to have been completed (*f*), and the vendor is entitled to interest on the unpaid purchase-money from the same time (*g*). But where the purchaser was in default of payment, under a contract by which the vendor was not bound to give up possession until payment, and the vendor, who occupied the property for the purpose of his business, continued the business on his own behalf under a pressure arising from the plaintiff's default, the vendor was adjudged to receive interest on his money, but not to pay an occupation rent for the premises from the time when the contract was made (*h*).

Interest.

Where no time is fixed for completion, interest is usually payable by the purchaser from the time of taking posses-

(*d*) *Murrell* v. *Goodyear*, 1 De G. F. & J. 432.

(*e*) *Lechmere* v. *Brasier*, 2 J. & W. 289; *Dalby* v. *Pullen*, 3 Sim. 29; *Fraser* v. *Wood*, 8 Beav. 339.

(*f*) *De Visme* v. *De V.*, 1 Mac. & G. 346.

(*g*) *Lowther* v. *C. of Andover*, 1 Bro. C. C. 396; *Calcraft* v. *Roebuck*, 1 Ves. 221.

(*h*) *Leggatt* v. *Met. Ry. Co.*, 5 Ch. 716.

sion (*i*). The purchaser, moreover, by taking possession, is deemed to have accepted the title (*k*), though this will not relieve the vendor from perfecting the title if it is in his power to do so.

Rents and profits.

In the case of sales by the order of the Court, if the estate be in possession, the purchaser will be entitled to the rents and profits from the quarter-day preceding his purchase, he paying his purchase-money before the following one (*l*). If the estate be reversionary, the purchaser will be entitled to any benefit from the dropping of lives after the time of confirming the report absolute, and will consequently be liable to pay interest from that time (*m*).

Accessions.

Deteriorations.

If there has been delay in making out the title, and the property has deteriorated by dilapidations or mismanagement, compensation will be allowed to the purchaser (*n*), but not for deterioration after the time when he ought to have taken possession (*o*), and of course not for deterioration occasioned by himself (*p*). Possession is not usually decreed pending a suit for specific performance; but the vendor, if remaining in possession, is a *quasi* trustee for the purchaser, and is bound to preserve the property (*q*). On the other hand, if the purchaser takes possession before completion, he may at his option pay the purchase-money or give up possession; in the latter case paying interest at 4 per cent. from the date for completion (*r*). If in possession the purchaser becomes liable for outgoings (*s*).

(*i*) *Birch* v. *Joy*, 3 H. L. 565; *Ballard* v. *Strutt*, 15 Ch. D. 122. See *Re Mayor of London and Tubbs' Contract*, (1894) 2 Ch. 524; 63 L. J. Ch. 580.

(*k*) *Re Gloag and Miller's Contract*, 23 Ch. D. 320; 52 L. J. Ch. 654.

(*l*) *Mackrell* v. *Hunt*, 2 Madd. 34, n.

(*m*) *Exp. Manning*, 2 P. Wms. 410; *Davy* v. *Barber*, 2 Atk. 489.

(*n*) *Foster* v. *Deacon*, 3 Madd. 394.

(*o*) *Binks* v. *Rokeby*, 2 Sw. 226.

(*p*) *Harford* v. *Purrier*, 1 Madd. 532.

(*q*) *Clarke* v. *Ramuz*, (1891) 2 Q. B. 456; 60 L. J. Q. B. 679; *Bygrave* v. *Met. Board of Works*, 32 Ch. D. 147; 55 L. J. Ch. 602.

(*r*) *Greenwood* v. *Turner*, (1891) 2 Ch. 144; 60 L. J. Ch. 351.

(*s*) See *Cook* v. *Andrews*, (1897) 1 Ch. 266; 66 L. J. Ch. 137; *Tubbs* v. *Wynne*, (1897) 1 Q. B. 74; 66 L. J. Q. B. 116.

When time is of the essence of the contract, and the purchaser obtains a decree for specific performance, he will be entitled to compensation for the loss which he has sustained in consequence of possession not having been given to him according to the contract (*t*).

Inquiry at chambers.

The general method of ascertaining the amount payable for compensation, is by directing an inquiry to that effect by the master in chambers.

II. *Where the Dispute relates to the Quantity or Quality of the Vendor's Interest.*

Disputes as to quantity and quality.

The consideration of these cases naturally falls into two divisions, according as to whether the vendor or the purchaser is plaintiff; but it must be remembered that in all cases the condition on which these suits are entertained is that of compensation for the error or misdescription. It follows that the deficiency or difference alleged must be such as to admit of the proper compensation being adequately calculated. Accordingly relief will be refused where, from the nature of the property or the nature of the dispute, the Court considers itself unable to fix or ascertain the amount proper to be allowed (*u*).

Compensation must be calculable.

1. *Where the vendor seeks specific performance.*

Vendors' suits generally.

At law, when a person contracted to sell a given interest, for instance, a given term of years, and it turned out that the interest was less than was represented, the purchaser might recover the deposit and rescind the contract, notwithstanding that the vendor might offer compensation.

(*t*) *Gedge* v. *Montrose*, 26 Beav. 45. Eq. 458; *Ridgway* v. *Gray*, 1 Mac. & G. 109.
(*u*) *Re Bunbury's Estate*, 1 I. R.

But in equity, if the purchaser can get substantially what he contracted for, the vendor can enforce specific performance against him, allowing compensation for the difference in value. But the amount of variation which equity will recognise as admissible without destroying the contract, is, of course, a matter of degree. In general terms, the misdescription must not be substantial. The particular inquiry is, what is, and what is not, considered substantial.

Difference must not be substantial.

Differences of tenure. What deemed substantial.

(1.) The difference often relates to the tenure of land; and it is established that a purchaser cannot be required to accept land of a different tenure from that for which he bargained. Thus leaseholds, however long the term, or copyholds, cannot be substituted for freeholds (*x*), nor freehold for copyhold, even though it may seem a better interest (*y*); though where the conditions of sale left the tenure doubtful or barred any objection on this ground, and the difference in value was slight, performance was enforced (*z*). Similarly, a perpetual rent-charge will not sufficiently answer the description of a fee simple (*a*), nor can a purchaser be compelled to take an underlease instead of an original lease (*b*). Moreover, in cases of this description, an express condition of sale that any misdescription shall not annul the sale, does not meet a purchaser's objection, such a condition relating to the corporeal property, not to the title (*c*). And where the term of a leasehold turns out to be largely different from what was represented, the vendor will not be able to enforce his bargain, *e.g.*, where the contract was for a sixteen years' lease, and the term offered was only six (*d*). A purchaser of an entirety would not be obliged to take an undivided

(*x*) *Drew* v. *Corp*, 9 Ves. 368.
(*y*) *Ayles* v. *Cox*, 16 Beav. 23.
(*z*) *Price* v. *Macaulay*, 2 De G. M. & G. 339.
(*a*) *Prendergast* v. *Eyre*, 2 Hogan, 81.
(*b*) *Madeley* v. *Booth*, 2 De G. & Sm. 718; *Re Beyfus and Masters' Contract*, 39 Ch. D. 110; *Waring* v. *Scotland*, 57 L. J. Ch. 1016; *Re Deighton and Harris' Contract*, (1898) 1 Ch. 458; 67 L. J. Ch. 240.
(*c*) *Re Beyfus and Masters' Contract*, *sup.*
(*d*) *Long* v. *Fletcher*, 2 Eq. Ca. Ab. 5, pl. 4.

share of the estate (*e*), nor a remainder instead of an estate in possession (*f*), nor an estate subject to unusual easements (*g*), or to an undisclosed reservation of minerals (*h*).

What not.

On the other hand, where there are undisclosed quit-rents, and rent-charges, at any rate if of small amount, they are considered fit subjects for compensation (*i*); and similarly, where there was a small error as to the term of a lease (*k*), or a mistake as to the amount of quit-rents sold (*l*).

Waiver by conduct of purchaser.

Objections to the tenure may be waived by the conduct of the purchaser, as by his proceeding with the treaty after notice of the nature thereof, though by such waiver he does not lose his claim to compensation on performance (*m*).

Differences of quantity or boundaries compensated if small and not material to enjoyment.

(2.) Another class of cases is where the misdescription relates to the quantity or the boundaries of the estate sold. Though the vendor fails to make a title to a small portion of the estate, if such portion is not material to the possession and enjoyment, specific performance with compensation will be decreed (*n*); but not if the portion is material, as where the contract is for a wharf and a jetty, and it turns out that the jetty is liable to be removed by the Corporation of London (*o*).

So, also, if a purchaser in the same contract agrees to purchase an estate for a fixed price, and also something else not essential to the enjoyment of the estate, but only a small adjunct of it, and a good title to this adjunct can-

(*e*) *Att.-Gen.* v. *Day*, 1 Ves. 218.
(*f*) *Collier* v. *Jenkins*, You. 295.
(*g*) *Seaman* v. *Vawdrey*, 16 Ves. 390.
(*h*) *Upperton* v. *Nickolson*, 6 Ch. 436.
(*i*) *Esdaile* v. *Stephenson*, 1 S. & S. 122; *Horniblow* v. *Shirley*, 13 Ves. 81.
(*k*) *Halsey* v. *Grant*, 13 Ves. 77.
(*l*) *Cuthbert* v. *Baker*, cited Sugd. V. & P. concise view, 219, ed. 1851.
(*m*) *Fordyce* v. *Ford*, 4 Bro. C. C. 494; *Calcraft* v. *Roebuck*, 1 Ves. jr. 221.
(*n*) *M'Queen* v. *Farquhar*, 11 Ves. 467; *Re Fawcett and Holmes' Contract*, 42 Ch. D. 150; 58 L. J. Ch. 763.
(*o*) *Peers* v. *Lambert*, 7 Beav. 546; *Perkins* v. *Ede*, 16 Beav. 193; *Jacobs* v. *Revell*, (1900) 2 Ch. 858; 69 L. J. Ch. 879.

not be made, the sale of the estate alone will be enforced; for instance, a contract to buy an estate for £24,000, and the furniture thereon at a valuation (*p*). *Secus*, if the adjunct is essential to the enjoyment of the property, as the fixtures of a public-house (*q*).

Sales by auction in lots.

In the case of an estate being sold by auction, after which it is found that a good title cannot be made to some of the lots, specific performance will be decreed, unless the lots as to which the failure occurs are complicated with the others (*r*); but everything depends in such a case upon the nature of the property; for instance, if a farm were sold along with a house for residence thereon, and the title to the house failed, the rest of the contract would not be enforced (*s*).

Effect of approximate description.

Where lands are described as of or about a certain acreage, or of a certain acreage "be the same more or less," and there is found to be a considerable discrepancy from the figure named, it appears that, in the absence of an express condition to the contrary, a purchaser may be allowed an abatement even after accepting a conveyance (*t*). *A fortiori*, if he discovers the error before conveyance, unless it is of trifling extent, he may claim abatement (*u*); nor would the purchaser's intimate acquaintance with the estate relieve the vendor (*x*).

If lands are purchased on the usual condition as to compensation for misdescription, and they prove to exceed the estimate, though the purchaser can enforce performance on paying compensation, the vendor cannot compel him to complete and pay a larger sum than he contracted to pay (*y*).

(*p*) *Richardson* v. *Smith*, 5 Ch. 648.

(*q*) *Darbey* v. *Whitaker*, 4 Drew. 134.

(*r*) *Poole* v. *Shergold*, 2 Bro. C. C. 118.

(*s*) *Perkins* v. *Ede*, 16 Beav. 193.

(*t*) *Palmer* v. *Johnson*, 13 Q. B. D. 351; 12 *ib.* 32; 53 L. J. Q. B. 348; *Re Turner and Skelton*, 13 Ch. D. 130.

(*u*) *Hill* v. *Buckley*, 17 Ves. 394; *Winch* v. *Winchester*, 1 V. & B. 375.

(*x*) *King* v. *Wilson*, 6 Beav. 124.

(*y*) *Price* v. *North*, 2 Y. & C. Ex. 620.

2. *Where the purchaser seeks specific performance.*

Purchasers' suits.

Purchaser can usually claim performance with abatement.

The general rule is that a purchaser may, if he chooses, compel a vendor who has contracted to sell a larger interest in an estate than he has, to convey to him such interest as he is entitled to, with compensation (*z*), and this whether the difference is one of tenure or of quantity (*a*). This has been done even where the difference in quantity amounted to as much as one-half (*b*). Where, however, the title of the vendor is doubtful or defective, it has been held that the purchaser cannot compel a conveyance of such interest as he has (*c*).

Exceptions.

Notice.

If the purchaser, at the time of the contract, knows of the limited interest of the vendor, he will not be able to insist upon a conveyance of such interest with compensation (*d*); and the neglect of a purchaser to make proper inquiries may disentitle him from claiming compensation for some defect which, with ordinary care, he might have discovered (*e*), as where a vendor had contracted to sell certain property which the purchaser knew to be in the occupation of a tenant, and it turned out that the tenant had an agreement for a lease (*f*), the occupation being considered to amount to constructive notice of the lease. But it appears that the doctrine of constructive notice is not generally applicable to such cases, and that at least it would not suffice in a vendor's suit (*g*), or in a purchaser's suit to give a title to compensation in respect of the tenant's interest (*h*).

(*z*) *Mortlock* v. *Buller*, 10 Ves. 315.

(*a*) *Hughes* v. *Jones*, 3 De G. F. & J. 307; *Wood* v. *Griffith*, Wilson Ch. Rep. 44; *Leslie* v. *Crommelin*, 2 I. R. Eq. 134; *Hooper* v. *Smart*, 18 Eq. 683; *McKenzie* v. *Hesketh*, 7 Ch. D. 675; *North* v. *Percival*, (1898) 2 Ch. 128; 67 L. J. Ch. 321.

(*b*) *Burrow* v. *Scammell*, 19 Ch. D. 175; but see *Wheatley* v. *Slade*, 4 Sim. 126.

(*c*) *Williams* v. *Higden*, 1 C. P. 500; *Rudd* v. *Lascelles*, (1900) 1 Ch. 815; 69 L. J. Ch. 396.

(*d*) *Lawrenson* v. *Butler*, 1 S. & L. 13; *Harnett* v. *Yeilding*, 2 S. & L. 549; *Castle* v. *Wilkinson*, 5 Ch. 534.

(*e*) *Edwards-Wood* v. *Majoribanks*, 7 H. L. 806.

(*f*) *James* v. *Lichfield*, 9 Eq. 51.

(*g*) *Caballero* v. *Henty*, 9 Ch. 447.

(*h*) *Phillips* v. *Miller*, 10 L. R. C. P. 428.

Mistake, purchaser's option to rescind.

Where, however, the statement as to quantity was simply a mistake, and it would be plainly unjust to the vendor to decree specific performance with compensation, the purchaser has been required to elect whether he would perform the contract without compensation, or have his action dismissed (*i*); in this case there was a difference of nearly one-half in the acreage stated.

Express stipulation to contrary.

The right to compensation also may be excluded by express contract, as by a stipulation to that effect contained in the conditions of sale (*k*), unless such a condition may be construed so as to extend only to small accidental inaccuracies (*l*). The right, however, is not excluded by a mere condition that he shall not object to complete the purchase if the quantity should turn out less than was stated in the particulars (*m*); nor by acts on his part which merely amount to a waiver of objections to the title (*n*). It may be excluded by the vendor rescinding the contract under a condition empowering him to do so, if unwilling or unable to make a satisfactory title (*o*); but not if the vendor sold the property under such a condition knowing his title to be defective, or has been guilty of wilful misrepresentation (*p*); and, notwithstanding such condition, if the purchaser is willing to waive all objections to the title, he is entitled to take the property without compensation (*q*).

Right of rescission.

The right to rescind may, moreover, be lost by the vendor's replying to the purchaser's objections or requisitions (*r*), and by acquiescence in, or confirmation of, the contract (*s*). A fuller discussion of the right of a pur-

(*i*) *Earl of Durham* v. *Legard*, 34 L. J. Ch. N. S. 589.

(*k*) *Cordingley* v. *Cheeseborough*, 3 Giff. 496.

(*l*) *Whittemore* v. *W.*, 8 Eq. 603; *Re Terry and White's Contract*, 32 Ch. D. 14; 55 L. J. Ch. 345.

(*m*) *Frost* v. *Brewer*, 3 Jur. 165.

(*n*) *Calcraft* v. *Roebuck*, 1 Ves. jr. 221.

(*o*) *Mawson* v. *Fletcher*, 6 Ch. 91; 10 Eq. 213; *Duddell* v. *Simpson*, 2 Ch. 102.

(*p*) *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Price* v. *Macaulay*, 2 De G. M. & G. 347.

(*q*) *Page* v. *Adam*, 4 Beav. 269.

(*r*) *Tanner* v. *Smith*, 10 Sim. 410.

(*s*) *Cole* v. *Gibbons*, 3 P. Wms. 290; *Attwood* v. *Small*, 6 Cl. & F. 424.

chaser to repudiate a contract on grounds of mistake and misrepresentation is found in the chapters on Mistake and Fraud (*t*). As to a vendor's right to rescind under a special condition enabling him so to do in case of the purchaser taking any objection to the title which the vendor is unable or unwilling to meet, reference may be made to *Re Dames and Wood* (*u*), in which it was held that, after the vendor had elected to rescind, it was not open to the purchaser to waive his objections and insist on the contract. Even under such a condition a mere dispute as to the form of conveyance is not a sufficient ground for rescission (*x*). The right of rescission must in any case be exercised in good faith. He may not keep the purchaser in suspense while he negotiates with other parties. If he does so, the purchaser may recover his deposit with interest and costs (*y*). After a final judgment has been given it is too late to exercise the right of rescission (*z*).

(*t*) *Supra*, pp. 162, 208.

(*u*) 29 Ch. D. 626. See also *Ashburner* v. *Sewell*, (1891) 3 Ch. 405; 60 L. J. Ch. 784.

(*x*) *Re Monkton and Gilzean*, 27 Ch. D. 555; 54 L. J. Ch. 257; *Hardman* v. *Child*, 28 Ch. D. 712; 54 L. J. Ch. 695.

(*y*) *Smith* v. *Wallace*, (1895) 1 Ch. 385; 64 L. J. Ch. 240.

(*z*) *Re Arbib and Class' Contract*, (1891) 1 Ch. 601; 60 L. J. Ch. 263.

CHAPTER VII.

INJUNCTIONS.

Injunction compared with specific performance.

In some respects analogous to the equitable remedy of specific performance is the equally characteristic remedy of injunction. A decree of specific performance, as its name implies, enforces the performance of some specific act. An injunction is the converse of this; it judicially forbids the performance of some specific act or series of acts.

From the nature of the case the remedy of specific performance only applies to cases arising out of contract; since it rarely happens apart from contract that one person has a right to the performance of a particular act on the part of another.

On the contrary, the cases for which injunction is a proper remedy have usually no connexion with contract. There are, indeed, cases in which one person contracts with another not to do a certain act; and such negative contracts may, as we have seen, be specifically enforced by means of injunction (*a*). In the absence of a negative stipulation, an affirmative contract will not be indirectly enforced by an injunction restraining an act inconsistent with the contract (*b*), and a negative stipulation will not be enforced if unreasonable or oppressive (*c*); or if, though negative in form, it is affirmative in substance (*d*). But a

(*a*) P. 711. *Lumley* v. *Wagner*, 1 De G. M. & G. 615; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, (1901) 2 Ch. 37; 70 L. J. Ch. 468; *Grimston* v. *Cuningham*, (1894) 1 Q. B. 125.

(*b*) *Whitwood Chemical Co.* v. *Hardman*, (1891) 2 Ch. 416; 60 L. J. Ch. 428, overruling *Montague* v. *Flockton*, 16 Eq. 189.

(*c*) *Ehrmann* v. *Bartholomew*, (1898) 1 Ch. 671; 67 L. J. Ch. 319; *Robinson* v. *Hever*, (1898) 2 Ch. 451; 67 L. J. Ch. 644.

(*d*) *Davis* v. *Foreman*, (1894) 3 Ch. 654; 64 L. J. Ch. 187.

great majority of the cases in which one person seeks to prohibit a certain act, depend on rights which avail against all the world; or, to use the technical language of jurisprudence, depend on *jura in rem*, not on *obligationes*. As far, however, as regards the remedy, there is little importance in the distinction. Whether the negative duty, or duty to abstain, be contractual or general, the injunction which enforces it is the same in nature and in form.

Definition.

An injunction may be described as a judicial process whereby a party is required to do a particular thing (*i.e.*, a mandatory injunction) or to refrain from doing a particular thing. There is, however, a marked contrast between injunctions which command and injunctions which forbid the doing of an act. The former, as a rule, only issue after decree, and are of the nature of an execution to enforce the same. Only in cases where there has been an evident attempt to anticipate and evade the ultimate decision of the Court has a mandatory interlocutory injunction been made (*e*).

Interlocutory or perpetual.

The latter may be either interlocutory or perpetual. Interlocutory injunctions are made pending the hearing of the cause upon the merits, and are generally expressed to continue until such hearing or until further order. Perpetual injunctions are such as form part of the decree made at the hearing upon the merits, and perpetually restrain the defendant from the assertion of a right or the commission of some act contrary to equity: they are in fact final decrees.

Interlocutory injunctions are merely provisional and do not conclude a right. Their object is to preserve the property subject to litigation *in statu quo* until the hearing or further order, and may be obtained by a plaintiff who shows that he has a fair question to raise as to the existence of the right which he alleges (*f*).

Mandatory injunctions.

It was formerly considered that a Court of equity had

(*e*) *Daniel* v. *Ferguson*, (1891) 2 Ch. 27; *Von Joel* v. *Hornsey*, (1895) 2 Ch. 774; 65 L. J. Ch. 774.

(*f*) See Kerr on Injunctions, pp. 11, 12, ed. 2.

no jurisdiction in the absence of contract to compel the performance of a positive act, such as the removal of a work already executed, though it might, by framing the order in an indirect form, compel a defendant to restore things to their former condition. The present practice, however, is to express such an injunction in a direct mandatory form (*g*). This jurisdiction is, however, only exercised in cases which admit of no other adequate remedy, and their occurrence is comparatively unfrequent. This species of relief will always be refused if the injury can be reasonably recompensed by damages, or even if the balance of convenience is strongly on the side of the defendant (*h*). And in fact, generally, the remedy of injunction will not be applied in trivial circumstances (*i*).

Enforcement.

An injunction, when granted, is enforceable, if need be, by committal for contempt in the event of disobedience, and this not only as against the parties to the action, but also against others knowingly abetting them in the breach (*k*).

Origin of the jurisdiction.

The jurisdiction of equity to decree injunctions arose, like that of specific performance, from the want of an adequate remedy at law. The common law had, indeed, in certain cases, the power of prohibiting the committal of wrongs; for instance, waste could be restrained by the writ of prohibition and estrepement of waste. But the cases in which the common law supplied remedies of this nature were very few, and the procedure by which they were applied was cumbrous and inconvenient, so that the assistance of equity was at an early period found necessary for the proper administration of justice; and when this jurisdiction was established, the superiority of its process

(*g*) *Jackson* v. *Normanby Brick Co.*, (1899) 1 Ch. 438; 68 L. J. Ch. 407; *Home and Colonial Stores* v. *Coll*, (1902) 1 Ch. 302.

(*h*) *Deere* v. *Guest*, 1 My. & C. 516; *Jacomb* v. *Knight*, 3 De G. J. & S. 538.

(*i*) *Llandudno Urban Council* v. *Woods*, (1899) 2 Ch. 705; 68 L. J. Ch. 623.

(*k*) *Wellesley* v. *Mornington*, 11 Beav. 180; *Seaward* v. *Paterson*, (1897) 1 Ch. 545; 66 L. J. Ch. 267.

gradually caused the inferior remedies of law to fall into desuetude.

Classification of injunctions.

The following is in substance the enumeration given by a learned author of the circumstances in which the remedy of injunction has been most commonly applied (*l*).

1. To stay proceedings in Courts of law.
2. To restrain the indorsement or negotiation of negotiable instruments, the sale of land, the sailing of a ship, the transfer of stock or the alienation of a specific chattel.
3. To prevent the wasting of assets or other property pending litigation.
4. To restrain trustees from assigning or improperly dealing with the legal estate or trust property.
5. To prevent the removing out of the jurisdiction, marrying, or having any intercourse which the Court disapproves of, with a ward.
6. To restrain the commission of every species of waste.
7. To prevent the infringement of patents and the violation of copyright.
8. To prevent the continuance of public or private nuisances.
9. To prevent multiplicity of suits and vexatious litigation.

It will be observed that this enumeration admits of a division into two strongly distinguished classes of cases; first, those in which the wrong restrained is one which is regarded as such in equity only, and in which, accordingly, the ground of the jurisdiction is the absence of a legal remedy altogether; secondly, those in which the wrong restrained is both legal and equitable, in which, therefore, the ground of the jurisdiction is the superiority of the equitable to the legal remedy.

Injunctions against equitable wrongs.

The former class comprises,—first, injunctions which are designed to prevent the abuse of legal processes, under

(*l*) Eden on Injunctions, p. 1.

circumstances which render it inequitable to apply them; secondly, injunctions protecting equitable estates and interests not recognized at law.

Injunctions against legal wrongs.

The latter class includes,—first, injunctions protecting common rights as to the enjoyment of land; secondly, injunctions protecting the peculiar rights arising from patents, copyright, and the use of trade marks.

The enumeration above quoted does not indeed pretend to be exhaustive; nor is it possible to specify every case to which the remedy of injunction might be applied. Wherever a plaintiff is equitably entitled *in rem* or *in personam* to restrain the commission or continuance of an act, he may be aided by means of injunction. The cases here given copiously illustrate the circumstances in which the remedy is most usually sought; and whatever other cases may suggest themselves will be found to fall easily within one or other of the classes indicated.

Section I.—Injunctions restraining Wrongs purely Equitable.

I. *To prevent the abuse of Legal Processes.*
II. *To protect Equitable Estates and Interests.*

I. *Injunctions to prevent the abuse of Legal Processes.*

The most important class of cases falling under this description is that of which one of the oldest and most famous of authorities is *The Earl of Oxford's Case* (*a*).

This case is celebrated in history on account of the warm dispute which arose therefrom between Lord Chancellor Ellesmere and Lord Chief Justice Coke. The former insisted on the right and jurisdiction of equity to restrain persons who had obtained judgments at law from making such judgments instruments of injustice. He did not pretend to a power to overrule the judgment, but claimed to prevent the party obtaining it from acting upon it contrary to conscience. The latter, however, considered the exercise of this power as an encroachment upon the jurisdiction of the Courts of common law. So far did the contention go that indictments were preferred at Coke's instigation against the parties who had filed their bill in Chancery, their counsel and solicitors; and, on the other hand, the Attorney-General was directed to prosecute in the Star Chamber those who had preferred the indictments.

In the event the jurisdiction of equity contended for was firmly established. And reasonably so, for it consisted not in any assumption of superiority to the Courts of law, but in the assertion of a right to control the acts

(*a*) 1 Ch. Rep. 1; 2 Wh. & T. L. C. 590.

of the parties concerned, according to principles of conscience and equity.

The recent history of this head of equitable jurisdiction shows by what steps it has come to be at present of very small effect and importance, compared with what it formerly had.

C. L. P. Act, 1854.

1. First, by the Common Law Procedure Act, 1854 (*b*), it was enacted (*c*) that equitable pleas and replications might be made use of at law. The effect of this might have been to have rendered the interference of equity on behalf of the defendant at law in the future unnecessary. But this effect was prevented by the narrow construction put upon the Act by the common law judges, who held that no equitable plea was good unless it disclosed facts which would entitle the defendant to a perpetual and unconditional injunction in equity (*d*). Thus in a multitude of cases applications to the Court of Chancery continued to be necessary. Moreover, the Act only gave an option to the defendant at law to plead an equitable defence; it still left him the *power* of proceeding in equity for an injunction as before (*e*).

Jud. Acts.

2. By the Judicature Acts, 1873 and 1875 (*f*), the principal previously existing Courts of law and equity were consolidated into the Supreme Court of Judicature, consisting of Her Majesty's High Court of Justice and Her Majesty's Court of Appeal; and it was enacted that in every division thereof law and equity should be concurrently administered. Further, by s. 24, sub-s. 5, of the Act of 1873, it is enacted that "no cause or proceeding "at any time pending in the High Court of Justice or "before the Court of Appeal shall be restrained by pro- "hibition or injunction; but every matter of equity on

(*b*) 17 & 18 Vict. c. 125.
(*c*) S. 83.
(*d*) *Jeffs* v. *Day*, L. R. 1 Q. B. 374.
(*e*) *Gompertz* v. *Pooley*, 4 Drew. 453.
(*f*) 36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77.

" which an injunction against the prosecution of any such " cause or proceeding might have been obtained if this " Act had not passed, either unconditionally or on any " terms or conditions, may be relied on by way of defence " thereto: Provided always, that nothing in this Act con- " tained shall disable either of the said Courts from " directing a stay of proceedings in any cause or matter " pending before it if it shall think fit; and any person, " whether a party or not to any such cause or matter, who " would have been entitled if this Act had not passed, to " apply to any Court to restrain the prosecution thereof, " or who may be entitled to enforce by attachment or " otherwise any judgment, decree, rule, or order contrary " to which all or any part of the proceedings in such cause " or matter may have been taken, shall be at liberty to " apply to the said Courts respectively, by motion in a " summary way, for a stay of proceedings in such cause or " matter, either generally, or so far as may be necessary " for the purposes of justice; and the Court shall there- " upon make such order as shall be just."

Effect of legislation.

The result of this legislation is to put a stop in general to injunctions against judicial proceedings; providing instead thereof a power for any division of the High Court to order a stay of its own proceedings, and in applications for this purpose to consider and give weight to those principles of equity which were previously invoked for the purpose of obtaining an injunction.

Cases not within the Acts.

3. Still, there are cases not affected by the Judicature Act in which this equitable procedure may still be appealed to; and it is therefore not idle to consider the principles by which it was and may be still directed.

In the first place, it is to be observed that the old jurisdiction remains in force as regards proceedings in all Courts not comprised by the Judicature Acts in the High Court of Justice.

Suits in

Thus, the Chancery Division may restrain a person

foreign Courts restrained.

within its jurisdiction from taking proceedings in Courts out of its jurisdiction—for instance, in Scotland, Ireland, the colonies, or in foreign countries (*g*). But no more in these cases than formerly in granting injunctions against proceedings in the ordinary Courts of law does equity affect to control, or overrule, or examine, the judicial or administrative action of the foreign tribunals (*h*). It addresses its decree to the person within its jurisdiction, forbidding his action (*i*).

And in English Courts not affected by the Acts.

Again, there are certain Courts in England which were not affected by the Judicature Act, and which, therefore, continue to be ruled by the old principles and procedure. One instance of this is the Lord Mayor's Court in London; and if from any circumstances it were inequitable that a person should take or continue proceedings therein, there seems no reason why he should not as formerly be restrained by a Court of equity (*k*). Other local Courts in England fall within the same principle (*l*).

Court of Bankruptcy.

4. The Court of Bankruptcy, which was not affected by the Judicature Act, is now incorporated in the High Court of Justice (*m*), and consequently its former power of restraining actions in other Courts no longer exists (*n*).

In what circumstances granted.

5. There being, therefore, cases in which injunctions against legal proceedings may still be sought in equity, it is not immaterial to inquire into the circumstances which will be deemed to warrant such application; especially since, in cases in which an injunction is no longer the proper remedy, the same circumstances which formerly warranted it will now entitle a defendant to a stay of proceedings.

(*g*) *Re Hermann Loog*, 36 Ch. D. 502.

(*h*) See *British S. Africa Co.* v. *Companhia de Moçambique*, (1893) A. C. 602; 63 L. J. Q. B. 70.

(*i*) *Portarlington* v. *Soulby*, 3 My. & K. 106; *Hope* v. *Carnegie*, 1 Ch. 320.

(*k*) *Mildred* v. *Neate*, 1 Dick. 279; *Cottesworth* v. *Stephens*, 4 Ha. 185.

(*l*) *Hedley* v. *Bates*, 13 Ch. D. 498; *Stannard* v. *St. Giles' Vestry*, 20 *ib.* 190.

(*m*) 46 & 47 Vict. c. 52, s. 93.

(*n*) *Re Barnett*, 15 Q. B. D. 169.

Lord Ellesmere in the principal case gave certain illustrations of the circumstances in which the Court had interfered to stay proceedings at law, on the grounds of some equity of which the defendant could not avail himself in a Court of law, but to which he might appeal as a suppliant in Chancery. The following heads have been specified as comprising the various grounds on which such interference of equity might be sought:—accident, mistake, fraud, accounts, illegal and immoral contracts, penalties and forfeitures, breaches of covenants, administration of assets, marshalling of securities and suretyship (*o*). The distinction between equitable and legal doctrines and practice as to these matters has already been expounded under the various headings of this work, and of course need not now be particularly referred to. It suffices to adduce a few illustrations of the operation of the jurisdiction in the cases in which it still applies, at the same time contrasting it with the procedure by which in other cases the same result is now reached.

Equitable title required.

First, however, we may premise that it was always necessary for a plaintiff seeking an injunction against legal proceedings to establish some special *equitable* title to relief—the remedy was not given on the ground of matter which might be alleged in defence at law (*p*); and thus the amendment of the law effected by the Common Law Procedure Act, 1854, already quoted, reduced the number of cases in which the remedy of injunction was available (*q*).

Mere error at law not sufficient.

Moreover, the principle of injunctions cannot be so applied as to amount in effect to an appeal from a Court of law. An injunction will never be granted against the execution of a judgment on the mere ground of its being a decision erroneous at law (*r*). Still less where the result has been

(*o*) Eden on Injunctions, 4; Joyce on Injunctions, 1053, 1257.

(*p*) *Harrison* v. *Nettleship*, 2 My. & K. 423.

(*q*) *Farebrother* v. *Welchman*, 3 Drew. 122, and cf. *Gompertz* v. *Pooley*, 4 Drew. 453.

(*r*) *Simpson* v. *Howden*, 3 My. & Cr. 108.

produced by the negligence of the party seeking relief (*s*). The illustrations adduced will show the nature of the special equitable claims which form proper grounds for seeking the remedy.

6. Perhaps there is no class of actions in which the remedy for injunction has been so frequently applied as in those of creditors against the legal personal representatives of deceased persons.

Executors and administrators protected.

In some of such cases the injunction is sought and granted for the protection of the executor or administrator. At law, when the legal personal representative had once acquired possession of or become chargeable with sufficient property of the deceased to discharge his debts, he remained chargeable, notwithstanding any accident, such as robbery or fire, which might destroy the property before its distribution; and it mattered not how free from default he may have been, or how great the liability thus devolving upon him personally. But in equity the hardship and injustice of a creditor's action under such circumstances was recognized; and on the application of the executor or administrator, a Court of equity would issue an injunction forbidding the creditor to continue his proceedings at law (*t*).

Stay of proceedings.

Under the present practice, the Courts of law would themselves stay proceedings under circumstances formerly warranting an injunction, and might direct the transfer of the action to the Chancery Division.

General creditors protected.

7. In another class of cases an injunction was obtainable for the protection of the general creditors. We have elsewhere seen that executors had at law large powers of preference with regard to the payment of the debts of their testator. To prevent the unfair exercise of this preference, Courts of equity encouraged suits for the general adminis-

(*s*) *Bateman* v. *Willoe*, 1 S. & L. 204.
(*t*) *Crosse* v. *Smith*, 7 East, 258; *Croft* v. *Lyndsey*, Freem. 1.

tration of estates, in which their decrees differed from a judgment at law in that they were equally in favour of all creditors. After the granting of such a decree, equity was wont to restrain all actions brought by individual creditors at law (*u*). But it would not interfere with a creditor who had obtained a judgment at law prior to the administration decree (*x*).

Present practice.

Under the present practice, a Court of law would stay proceedings in such an action (*y*), and the judge in whose Court the administration action is pending has power, without any further consent, to order the transfer to himself of an action pending in any other Division of the Court brought by or against the executors or administrators whose assets are being administered (*z*).

Injunctions in winding-up.

Similar to these cases were those in which actions at law were commenced against a company after proceedings had been taken in equity for its winding-up. These cases are now also provided for by the rule of Court above referred to.

Arbitration.

The Court will not restrain a party from proceeding with an arbitration, whether the source of the objection is that the matter referred is beyond the scope of the agreement to refer (*a*) or that the party is proceeding without authority in the name of another (*b*) ; but it has jurisdiction to restrain such proceeding if, for example, it is satisfied that injury will result to the party complaining if the arbitration is allowed to proceed, but it will not do so merely on the ground that the arbitration will be futile (*c*).

(*u*) *Morrice* v. *B. of England*, Ca. t. Talb. 217; 4 Bro. P. C. 287; *Rush* v. *Higgs*, 4 Ves. 638.

(*x*) *Haly* v. *Barry*, 3 Ch. 452; *Etheridge* v. *Womersley*, 29 Ch. D. 557; 54 L. J. Ch. 965.

(*y*) *Crowle* v. *Russell*, 4 C. P. D. 186.

(*z*) Order XLIX., rule 5 (1883).

(*a*) *North London R. Co.* v. *G. N. R. Co.*, 11 Q. B. D. 30; 52 L. J. Q. B. 380.

(*b*) *Lond. & Blackwall R. Co.* v. *Cross*, 31 Ch. D. 354; 58 L. J. Ch. 313; but see and distinguish *G. W. R. Co.* v. *W. & L. R. Co.*, 17 Ch. D. 493.

(*c*) *Farrar* v. *Cooper*, 44 Ch. D. 323; 59 L. J. Ch. 506; *Kitts* v. *Moore*, (1895) 1 Q. B. 253; 64 L. J. Q. B. 152.

Equitable defences against legal instruments.

8. Other illustrations of the granting of similar injunctions are afforded by cases in which instruments legally binding have been obtained by such actual or constructive fraud as confers an equitable title to relief against them. Such matters can now, of course, be pleaded in defence in any Division of the Court; formerly the relief took the form of an injunction restraining legal proceedings on the instrument (*d*).

Trust estates protected.

9. Where, again, the legal and equitable titles to property were in different people, an action at law by the person having the legal estate was restrained by injunction. Thus separate estate limited to a married woman without the intervention of trustees, was protected against the judgment creditors of her husband by this means. The creditors, indeed, obtained a legal title through the husband; but he being in equity a trustee, their execution was restrained by injunction (*e*).

Injunctions against multiplicity of actions.

10. The desire to avoid multiplicity of actions was also a frequent ground of injunctions to stay proceedings. A party was never suffered to sue for the same thing at the same time in equity and at law. When litigation was pending in one Court in which complete relief could be had, and it was sought to institute proceedings elsewhere, the person so attempting was restrained by injunction (*f*); *à fortiori* if the design of the foreign proceedings was to gain some unfair advantage, as where a creditor who had a specific charge upon a part of the testator's real estate came in under a decree in a general administration suit, and then claimed to prove in a creditors' suit which he had instituted in Ireland (*g*).

Foreign suits, when restrained.

11. In the case of foreign suits, even though no decree has been obtained in this country, yet if a suit instituted

(*d*) *Lloyd* v. *Clark*, 6 Beav. 309; *Tyler* v. *Yates*, 11 Eq. 265.

(*e*) *Newlands* v. *Paynter*, 4 My. & Cr. 408.

(*f*) *Carron, &c. Co.* v. *Maclaren*, 5 H. L. 416, 437; *Harrison* v. *Gurney*, 2 J. & W. 563.

(*g*) *Beauchamp* v. *Huntley*, Jac. 546.

abroad appears ill-calculated to answer the ends of justice, it may be restrained (*h*). And where there has been no question as to the necessity of the foreign litigation, a person within the jurisdiction of the Court of Chancery has been restrained from proceedings which are deemed by it contrary to good conscience, such as a suit to recover a gambling debt (*i*).

The fact of a foreigner having property in this country enables the Court to make effectual an injunction issued against him (*k*).

On the contrary, where such interposition would not tend to equality of all parties, or where it would not add to the convenience of proceeding, it will not be granted (*l*).

When a foreigner seeks no assistance from the Courts of this country, it requires a very strong case to induce them to restrain him, when domiciled in another country, from proceeding to obtain payment of his debts according to the law of that country (*m*).

Application for Acts of Parliament.

12. Analogous in principle to the restraining of proceedings in Courts of justice are those in which application has been made to the Court of Chancery against a party applying for a private Act of Parliament, or for an Act respecting property. It has been laid down by many judges that the Court, acting *in personam*, has power to grant such an injunction, though there is no case in which it has been actually carried into effect. In *Heathcote* v. *N. S. R. Co.* (*n*) an injunction was granted by Sir L. Shadwell, but was dissolved by Lord Cottenham on appeal, not indeed on the general ground of want of jurisdiction, but from the absence in that case of circumstances warranting such a decree. His lordship pointed out an important distinction between such a case and an injunction against

(*h*) *Baillie* v. *B.*, 5 Eq. 175.
(*i*) *Portarlington* v. *Soulby*, 3 My. & K. 104; *Simpson* v. *Fogo*, 1 J. & H. 18; 1 H. & M. 195.
(*k*) *Carron, &c. Co.* v. *Maclaren*, *sup.*
(*l*) *Liverpool, &c. Co.* v. *Hunter*, 4 Eq. 62; 3 Ch. 479; *Jones* v. *Geddes*, 1 Ph. 725.
(*m*) *Carron, &c. Co.* v. *Maclaren*, *sup.*
(*n*) 2 Mac. & G. 100.

proceedings at law, the ground of the latter being that it was sought to interfere with an inequitable use of a legal right, while in the former case, it was the ordinary province of the legislature to abrogate existing rights and create new ones. To hold, therefore, that no application should be made to Parliament because its object was to interfere with some right or interest, would be in effect to hold that the Court should by its injunction deprive the subject of the benefit of parliamentary interference. An injunction, therefore, could not be granted on the ground that the Act of Parliament sought for would interfere with existing rights, it being the very object of it to do so.

Upon the same principle, in the absence of some special equity, the Court will not restrain an application to the legislature of a foreign country (*o*).

When restrained.

As, however, it is unlawful, and in fact a breach of trust, to apply the funds of a company in an application to Parliament for powers to extend the business of the company beyond the objects for which it was constituted, the Court has power, at the suit of any of the shareholders, to interfere by injunction to restrain such application (*p*). The funds of a company may, however, be employed in defence of existing rights, and if it be necessary to apply to Parliament for their protection, such application will not be restrained (*q*).

Equity protects its own officers.

13. Courts of equity have always been careful to protect their own officers in the execution of the processes of the Court against any actions brought against them for acts done in pursuance of their duty. If the processes were irregular, they were not to be examined in other Courts; the Courts of equity would themselves apply the proper remedy (*r*).

(*o*) *Bill* v. *Sierra, &c. Co.*, 1 De G. F. & J. 177.

(*p*) *Simpson* v. *Denison*, 10 Ha. 51; see also *G. W. R. Co.* v. *Rushout*, 5 De G. & Sm. 290.

(*q*) *Bright* v. *North*, 2 Ph. 216.

(*r*) *May* v. *Hook*, 2 Dick. 619, cited; *Walker* v. *Micklethwait*, 1 Dr. & Sm. 49.

Criminal proceedings not restrained.

14. It may be laid down as a general principle that a Court of equity neither has nor had any jurisdiction to restrain by injunction any criminal proceedings (*s*). It was but an apparent exception that when the person instituting such proceedings was at the same time himself a plaintiff in equity, the Court had power to require him to elect between his suit in equity and his prosecution (*t*); and this case has been disapproved of by high authority (*u*). Under s. 85 of the Companies Act, 1862, the Court has, after the presentation of a petition for winding-up, restrained criminal proceedings against the company (*x*).

II. *Injunctions protecting Equitable Estates and Interests not recognized at Law.*

Trust property protected.

1. Trusts supply the most extensive and important class of purely equitable estates. An illustration which falls with equal propriety under this head has been already given of the protection of trust property by means of injunction (*y*). Other instances of a similar nature may be easily supplied; for example, where a trustee seeks payment to himself of a legacy bequeathed to his *cestui que trust* (*z*). So where a *cestui que trust* proves a probable intention on the part of his trustee to commit a breach of trust, he may procure an injunction to restrain him (*a*); and it is not necessary to entitle him to this relief that the threatened damage should be irreparable (*b*). It is the right and duty of a trustee who apprehends a breach of

Breach of trust restrained.

(*s*) *Montague* v. *Dodman*, 2 Ves. sr. 396.

(*t*) *M. of York* v. *Pilkington*, 2 Atk. 302.

(*u*) *Saull* v. *Browne*, 10 Ch. 64; *Kerr* v. *Corp. of Preston*, 6 Ch. D. 463; *Grand Junction, &c. Co.* v. *Hampton Urban Council*, (1898) 2 Ch. 701; 67 L. J. Ch. 703.

(*x*) *Re Briton Medical and General Co.*, 32 Ch. D. 503; 55 L. J. Ch. 416.

(*y*) *Newlands* v. *Paynter*, 4 My. & Cr. 408.

(*z*) *Hill* v. *Turner*, 1 Atk. 516.

(*a*) *Balls* v. *Strutt*, 1 Ha. 146.

(*b*) *Anon.*, 6 Mad. 10; *Dance* v. *Goldingham*, 8 Ch. 902.

trust by his co-trustee to seek an injunction to restrain him (*c*).

Liens protected.

2. Thus again, the lien of a purchaser has been protected by an injunction restraining the vendor from parting with the legal estate (*d*); and similarly, the interest of an equitable mortgagee (*e*). Constructive trusts arising from frauds have also been assisted by restraining the indorsement or negotiation of notes fraudulently obtained (*f*).

Constructive trusts.

Improper dealing with wards of Court.

3. We have seen elsewhere (p. 455) that the unauthorised marriage or removal of wards of Court will be prohibited by injunction; a guardian may even be restrained from giving his consent to such a marriage without the leave of the Court (*g*); and, by an analogous jurisdiction, fathers have for special reasons been restrained from taking their children abroad, or interfering with their education (*h*).

(*c*) *Re Chertsey Market*, 6 Pri. 279.
(*d*) *Echliff* v. *Baldwin*, 16 Ves. 267.
(*e*) *Lond. & County Bk.* v. *Lewis*, 21 Ch. D. 490.
(*f*) *Smith* v. *Aykwell*, 3 Atk. 566.
(*g*) *Beard* v. *Travers*, 1 Ves. 313.
(*h*) *Exp. Warner*, 4 Bro. C. C. 101; *De Manneville* v. *De M.*, 10 Ves. 52.

Section II.—Injunctions Restraining Wrongs at once Legal and Equitable.

General Principles.

I. *Injunctions protecting Rights in Land.*

1. *Waste.*
   (1.) *Doctrines and remedies of Law as to waste.*
   (2.) *Doctrines and remedies of Equity as to waste.*
2. *Trespass.*
3. *Nuisances.*
4. *Libel, &c.*

II. *Injunctions protecting Patent Rights, &c.*

1. *Patents.*
2. *Copyright.*
3. *Trade marks.*
4. *Goodwill.*

Principles of the jurisdiction.

The protection of legal rights to property from irreparable, or at least from serious damage, pending the trial of the legal right, is part of the original and proper office of a Court of equity (*a*). It has sometimes been quoted as a maxim that *equity will not suffer a wrong without a remedy*. A full discussion, therefore, of the cases in which the protection of an injunction might be afforded would require an exposition of legal rights generally, which cannot, of course, be here attempted. It must suffice, first, to indicate the general principles by which the exercise of the jurisdiction is directed, and secondly, to pass in review, by way of illustration, some of the most frequently occurring and important cases in which this particular remedy is applied.

(*a*) Kerr, Inj. 13; *Hilton* v. *Granville*, Cr. & Ph. 283, 292.

Plaintiff must show *primâ facie* right,

(1.) A plaintiff seeking in equity an injunction for the protection of a legal right, must first show a fair *primâ facie* case in support of the title which he asserts (*b*). It is not necessary for him to show a clear legal title, but he must satisfy the Court that he has a fair question to raise as to the existence of the legal right which he sets up (*c*).

and that defendant's right is doubtful, or his act is injurious,

(2.) He must also show that there are substantial grounds for doubting the existence of the right asserted by the defendant whom he seeks to restrain (*d*); or, if his legal right is not disputed, he must show that the act complained of is in fact a violation of his right (*e*), and that there is a real probability or danger of his right being invaded. On the one hand, the mere apprehension of injury is not sufficient (*f*); on the other, the mere denial by the defendant of his intention to infringe the plaintiff's right will not necessarily prevent the Court from interfering (*g*). It suffices if the Court is satisfied that an infringement is threatened or is imminent (*h*). Statutory or contractual rights may be protected by injunction, moreover, without proof of actual damage (*i*).

and that the legal remedy is insufficient.

(3.) Thirdly, the plaintiff must show that the mischief which he seeks to restrain will be such as to be incapable of reparation by any legal remedy. It must be such as that a mere payment of damages will not suffice to put the parties in their original position (*k*). This may be the case either because the act threatened would destroy the

(*b*) Kerr, Inj. 13; *Saunders* v. *Smith*, 3 My. & Cr. 714, 728.

(*c*) *Shrewsbury & Chester R. Co.* v. *Shrewsbury & Birmingham R. Co.*, 1 Sim. N. S. 410, 426.

(*d*) *Sparrow* v. *O. W. & W. R. Co.*, 9 Ha. 436, 441.

(*e*) *Ripon* v. *Hobart*, 3 My. & K. 169, 176; *Haines* v. *Taylor*, 10 Beav. 471; 2 Ph. 209; *Gas Light & Coke Co.* v. *St. Mary Abbott Vestry*, 15 Q. B. D. 1; 54 L. J. Q. B. 414.

(*f*) *Hanson* v. *Gardiner*, 7 Ves. 307; *Batten* v. *Gedye*, 41 Ch. D. 507; 58 L. J. Ch. 549.

(*g*) *Jackson* v. *Cator*, 5 Ves. 688.

(*h*) *Gibson* v. *Smith*, 2 Atk. 182.

(*i*) *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 21 Ch. D. 752; *Att.-Gen.* v. *G. E. R. Co.*, 11 *ib.* 449; *Herron* v. *Rathmines, &c. Comm.*, (1892) A. C. 498.

(*k*) *Wood* v. *Sutcliffe*, 2 Sim. N. S. 165.

subject-matter of dispute (*l*), or because the nature of the act renders it impossible to accurately ascertain the damage (*m*).

On these general conditions rests the jurisdiction to grant an injunction for the protection of a legal right. The detailed considerations which affect it will best be seen under the headings which particularly illustrate its application. These fall under one or other of two classes, of which the first comprises common law rights respecting the enjoyment of land or houses; the second, the somewhat peculiar class of rights which arise from patents, copyright, and the use of trade marks.

It should be observed that by the Judicature Act it is enacted that, "a mandamus or an injunction may be "granted by an interlocutory order of the Court in all "cases in which it shall appear to the Court to be just or "convenient that such an order should be made" (*n*). Jud. Act, s. 25, sub-s. 8.

On these words it has been argued that the principles on which the Courts proceeded in granting injunctions were thereby extended, and in many cases it has been sought to secure the assistance of this remedy in circumstances under which, before the acts, it would have been admittedly refused. It has, however, been clearly established that the principles which move the Court in granting injunctions have not been extended by the Act (*o*). No more than before will it interfere in cases where no legal injury has been effected or threatened. Typical cases of this kind are found in *Day* v. *Brownrigg* (*p*), where an injunction was sought to restrain the defendant from giving a name to his house which might confuse it with a neighbouring house, and in *Street* v. *Union Bank of Spain* (*q*), in which an injunction was sought to restrain the use of a cypher

(*l*) *Hilton* v. *Granville*, Cr. & Ph. 283, 292.
(*m*) *Att.-Gen.* v. *Aspinall*, 2 My. & Cr. 613.
(*n*) 36 & 37 Vict. c. 66, s. 25, sub-s. 8.
(*o*) *Kitts* v. *Moore*, (1895) 1 Q. B. 253; 64 L. J. Q. B. 152; *Carter* v. *Fey*, (1894) 2 Ch. 541.
(*p*) 10 Ch. D. 294.
(*q*) 30 Ch. D. 156; 55 L. J. Ch. 31.

address. In both cases the remedy was refused, on the ground that it was but an *inconvenience*, not a legal injury, which was threatened (*r*). Under this Act, however, an injunction has been granted in support of a legal right, notwithstanding the existence of the legal remedy by *Quo warranto* (*s*), and it appears that now the Court may, in an ejectment action, protect the property before judgment, as under the old law it lacked jurisdiction to do (*t*).

I. *Injunctions protecting Rights in Land.*

1. Injunctions against waste.

Some of the most important cases in which equity assists the law by applying its special processes for the protection of legal rights are supplied by questions respecting waste. There are indeed cases of waste in which the wrong redressed is simply equitable, and which would, therefore, more strictly fall under the preceding heading. But it will be more convenient to treat together the various matters concerning waste which call for comment; and in doing so, the distinctions between legal and equitable waste will be plainly indicated. The principles of equity respecting waste will most clearly appear if we first review those of law on the same subject.

(1.) *The doctrines and remedies of law as to waste.*

Definition.

Waste at law has been defined as "any spoil or destruc-
" tion done, or allowed to be done, to houses, woods, lands,

(*r*) And see *North Lond. R. Co.* v. *G. N. R. Co.*, 11 Q. B. D. 30; 52 L. J. Q. B. 380; and see also *Du Boulay* v. *Du B.*, L. R. 2 P. C. 430; *Att.-Gen.* v. *Clerkenwell Vestry*, (1891) 3 Ch. 527; *Cowley* v. *C.*, (1901) A. C. 450; *Saunders* v. *Sun Life Ass. of Canada*, (1894) 1 Ch. 537; 63 L. J. Ch. 247.

(*s*) *Richardson* v. *Methley School Board*, (1893) 3 Ch. 510; 62 L. J. Ch. 943.

(*t*) *Berry* v. *Kean*, 51 L. J. Ch. 912; *Foxwell* v. *Van Grutten*, (1897) 1 Ch. 64; 66 L. J. Ch. 53.

" or other corporeal hereditaments by the tenant thereof, " during the continuance of his particular estate " (*u*).

(a.) *Against whom chargeable.*

Tenant for life.

Waste, as distinguished from trespass, could only be committed by a limited owner, that is, a tenant for life, or for years, in dower or in curtesy, and it could only be charged against him by one between whom and himself there was privity of estate.

Tenant in tail not liable.

A tenant in tail after possibility of issue extinct, although practically a tenant for life, was not within the legal restrictions as to waste; he was regarded as having an inheritance (*x*), but a person to whom he conveyed his estate was treated only as tenant for life (*y*).

Legal waste allowed.

These legal restrictions from waste have no application when the instrument giving rise to the life or limited tenancy contains with respect thereto the common clause " without impeachment of waste," or its equivalent. Then, he may fell timber, or open quarries or mines, and will be entitled to the full produce (*z*). In the presence of these words, the Courts of law possessed no restraining power, and had no further jurisdiction.

(b.) *What acts amount to waste at law.*

Felling timber.

i. Timber trees (oak, ash and elm) being part of the inheritance, it is waste to fell or lop them, or do any act whereby they might decay. A tenant is allowed to cut down trees under twenty years old for the purpose of allowing the proper development and growth of other timber in the same wood and plantation; that is improvement rather than waste (*a*). The tenant for life of a timber estate, *i. e.*, an estate cultivated merely for the produce of saleable timber, and where timber is cut periodically, may fell it in the ordinary course. To do so is a mode of cultivation, and timber felled in proper course

(*u*) 3 Steph. Com. 405, 7th ed.
(*x*) *Williams* v. *W.*, 15 Ves. 419.
(*y*) *George Ap-Rice's Case*, 3 Leon. 241.
(*z*) *Lewis Bowles' Case*, 11 Rep. 83.
(*a*) *Honywood* v. *H.*, 18 Eq. 310; *Lowndes* v. *Norton*, 6 Ch. D. 139.

constitutes the annual fruit of such land, such as the settlor of the land would expect the successive tenants to receive, and the nature of the act may be affected by local usage or custom (*b*). He may also cut underwood and willows in due course (*c*), and all trees other than timber trees (*d*).

It is provided by the Settled Land Act, 1882, that where a tenant for life is impeachable for waste in respect of timber, and there is on the settled estate timber ripe for cutting, the tenant for life may, with the consent of the trustees, or by obtaining an order of the Court, cut and sell such timber; on such sale, three-fourths of the proceeds are to be set aside as capital money, and one-fourth is applied as income (*e*).

Opening new pits or mines.

ii. A tenant for life commits waste by digging pits for gravel, lime, clay, stone, &c. (except for repairs), or by opening new mines for metal, coal, &c. (*f*); but he may continue working pits and mines previously opened, and in order to do so may make new pits or shafts (*g*).

(c.) *Remedies at law.*

Writ of waste.

The remedies for waste at law were by writ of waste (abolished by 3 & 4 Will. 4, c. 27, s. 36), by an action for damages, by trover for trees, &c., which became the property of the next owner of the inheritance as soon as they were felled, or by action for money had and received for the produce of their sale (*h*).

Inadequacy of the remedy.

The incompleteness or inadequacy of these remedies is very apparent. They only contemplate the recovery of damages after the waste has been committed, and previous to 17 & 18 Vict. c. 125, Courts of law had no power to prevent by injunction the commission of the waste.

(*b*) *Dashwood* v. *Magniac*, (1891) 3 Ch. 306; 60 L. J. Ch. 809.
(*c*) *Hampton* v. *Hodges*, 8 Ves. 105; *Phillips* v. *Smith*, 14 M. & W. 589.
(*d*) *Honywood* v. *H.*, 18 Eq. 310.
(*e*) 45 & 46 Vict. c. 38, s. 35.
(*f*) Co. Litt. 53 b.; *Viner* v. *Vaughan*, 2 Beav. 466; *Campbell* v. *Wardlaw*, 8 A. C. 641.
(*g*) *Clavering* v. *C.*, 2 P. Wms. 388; *Elias* v. *Griffith*, 8 Ch. D. 521.
(*h*) *Seagram* v. *Knight*, 2 Ch. 632.

Again, Courts of law had no efficient machinery for the taking of accounts, which were often long and complicated. Further, they supplied no remedy at all for many cases of legal waste, as will be more fully seen when considering the nature of the equitable jurisdiction. And lastly, they took no cognizance whatever of what is termed equitable waste.

Of course the contrast thus suggested between law and equity is now a matter of history. By the Judicature Act, 1873 (*i*), it is enacted that, "An estate for life without "impeachment of waste shall not confer or be deemed to "have conferred upon the tenant for life any legal right "to commit waste of the description known as equitable "waste, unless an intention to confer such right shall ex- "pressly appear by the instrument creating such estate." Though tenants for years and tenants in tail after possibility of issue extinct are not here mentioned, they are brought within the same rule by sub-s. 11, which enacts that in case of a conflict between law and equity the rules of equity shall prevail.

(2.) *The doctrines and remedies of equity as to waste.*

Contrast of law and equity.

The contrast between the doctrines of equity and those of law with respect to waste is twofold. In the first place, it consists in the more extended meaning which equity ascribes to the word, reckoning, as it does, many acts as waste which the law did not consider chargeable. Secondly, equity affords a remedy to many persons to whom law would not have allowed a *locus standi*. Its jurisdiction, therefore, in cases of waste depends partly upon the nature of the act complained of, partly upon the position of the parties.

(a.) *As to the nature of the act charged.*

The consideration of the jurisdiction which particularly depends on the nature of the waste complained of, requires a definition of equitable waste.

(*i*) 36 & 37 Vict. c. 66, s. 25, sub-s. 3.

Equitable waste defined.

Though equity follows the law in allowing weight to the words "without impeachment of waste," or their equivalent, when used respecting a limited tenancy, it does so only to a certain degree. When they are used it will not restrain from the committing of ordinary waste, such as cutting timber trees and opening mines; but it will not allow this power to be exercised contrary to conscience and in an unreasonable manner, so as to amount in fact to a destruction of the estate settled (*k*).

Instances of equitable waste.

The following acts of waste, with which in tenancies "without impeachment of waste" the law would not have interfered, have been deemed unconscionable and unreasonable in equity, and constitute, therefore, equitable waste:—

Destroying mansion house.

i. The destruction or dismantling of the mansion house (*l*), and the wanton pulling down of farmhouses on the property (*m*). If, however, such destruction has been simply for the purpose of erecting houses of a better kind or in more favourable situations, the tenant incurs no liability to account (*n*).

Stripping estate of timber.

ii. Though equity allows the ordinary and reasonable cutting of timber, it will interfere if a tenant threatens to strip the estate thereof, or to grubb up a wood settled, or make any such extravagant misuse of the power (*o*).

Felling ornamental timber.

iii. Similarly, it will not allow the felling of timber planted or left standing for the shelter or ornament of a mansion house or grounds (*p*), even if planted by the tenant himself (*q*). In applying this restriction equity will not criticise the designs of the settlor: his taste as well as his will binds his successors (*r*). The principle extends also to ornaments of outhouses and grounds, plantations, vistas, avenues, and to all the rides for ten miles round (*r*);

(*k*) *Vane* v. *Barnard*, 2 Vern. 78.
(*l*) *Lord Barnard's Case*, *ibid.*
(*m*) *Aston* v. *A.*, 1 Ves. sr. 265.
(*n*) *Morris* v. *M.*, 3 De G. & J. 323.
(*o*) *Talbot* v. *Hope-Scott*, 4 K. & J. 96; *Abrahal* v. *Bubb*, 2 Freem. 54.
(*p*) *Rolt* v. *Somerville*, 2 Eq. Ca. Ab. 759.
(*q*) *Coffin* v. *C.*, Jac. 71.
(*r*) *M. of Downshire* v. *Sandys*, 6 Ves. 110.

but not necessarily so as to prevent the cutting for repairs of woods through which such rides pass (*s*).

Cutting saplings.

iv. The Court will prevent the cuttings of saplings not proper to be felled (*t*), and of underwood before it is of sufficient growth (*u*), but not the felling of timber merely because it is not full grown or proper for building (*v*).

Improvident mining.

v. Analogous to the wanton destruction of timber is the improvident or destructive working of mines, from which a tenant for life may be restrained, though not impeachable for waste.

Permissive waste.

vi. It is now settled that the Court will not usually interfere to prevent or remedy permissive waste, that is to say, waste occasioned not by act, but by omission, as by suffering houses to fall into decay for want of repairs (*x*); but an account was directed where there was an express covenant to repair (*y*). And the principle does not apply in the case of a tenant for life of leaseholds, who is bound by the covenants in the lease (*z*).

An interference with property is technically "waste," although its effect may be to improve the property. To such the term "ameliorating waste" has been applied; and the exercise of the remedy of injunction being discretionary, the Court has refused to interfere in cases of this kind (*a*).

(b.) *By and against whom waste may be charged.*

The next inquiry is as to those cases in which the jurisdiction of equity arises from the position of the parties concerned being such as to leave no remedy at law.

Tenant in tail after possibility of issue extinct.

i. A tenant in tail after possibility of issue extinct,

(*s*) *M. of Downshire* v. *Sandys*, *sup.*

(*t*) *O'Brien* v. *O'B.*, Amb. 107.

(*u*) *Brydges* v. *Stevens*, 6 Madd. 279.

(*v*) *Aston* v. *A.*, *sup.*

(*x*) *Powys* v. *Blagrave*, Kay, 495; 4 De G. M. & G. 448; *Aris* v. *Newman*, 41 Ch. D. 532; 58 L. J. Ch. 590; *Tomlinson* v. *Andrew*, (1898) 1 Ch. 232; 67 L. J. Ch. 97; *Dimond* v. *Newburn*, (1898) 1 Ch. 28; 67 L. J. Ch. 14.

(*y*) *Marsh* v. *Wells*, 2 S. & S. 87; see *Tucker* v. *Linger*, 21 Ch. D. 18.

(*z*) *Betty* v. *Att.-Gen.*, (1899) 1 Ch. 821; 68 L. J. Ch. 435; *Cooper* v. *Gjers*, (1899) 2 Ch. 54; 68 L. J. Ch. 442.

(*a*) *Doherty* v. *Allman*, 3 App. C. 709; *Meux* v. *Cobley*, (1892) 2 Ch. 253; 61 L. J. Ch. 449.

although unimpeachable of waste at law, is within the principle of equitable waste, and will be restrained in equity from committing malicious and extravagant waste, such as pulling down houses, and the other acts above mentioned (*b*). But equity will not, any more than law, interfere with an ordinary tenant in tail, who may at his unrestrained pleasure commit any degree of waste, and this notwithstanding that he is restrained by statute from barring his issue or those in remainder, with reversion to the Crown (*c*).

Tenant in tail not accountable generally.

Mortgagee in possession.

ii. A mortgagee in fee in possession may at present be restrained from committing waste, as by cutting timber, unless the security be insufficient; and if so, the money arising by sale of the timber or otherwise from the waste must be applied to sink the principal and interest of the debt (*d*).

But as regards mortgages executed after Dec. 31st, 1881, it has now been enacted that a mortgagee in possession shall have power to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, unless a contrary intention is expressed in the mortgage deed (*e*).

Mortgagor.

On the other hand, a mortgagor in possession will be restrained from waste at the suit of the mortgagee, on his showing that the security would be thereby rendered insufficient or scanty (*f*).

Tenant for life, remainder for life.

iii. The most important of the cases under this heading are those which are illustrated by the leading authority of *Garth* v. *Cotton* (*g*).

In its simplest form it is as follows: An estate is limited to a tenant for life, remainder to another for life, with remainder over in fee or in tail. Here the remainderman

(*b*) *Att.-Gen.* v. *D. of Marlborough*, 3 Madd. 538.
(*c*) *Ibid.*, 498, 536, 539.
(*d*) *Farrant* v. *Lovel*, 3 Atk. 723.
(*e*) 44 & 45 Vict. c. 41, s. 19.
(*f*) *Humphreys* v. *Harrison*, 1 J. & W. 581; *King* v. *Smith*, 2 Ha. 239.
(*g*) 1 Ves. sr. 524, 546; 1 Dick. 183; 1 W. & T. L. C. 751.

for life could not sue for waste at law, because he has not the inheritance; and the remainderman in fee or tail could not sue, because the plaintiff at law must recover the place wasted, and that would be an injustice to the remainder for life which is not forfeited. Under such circumstances equity has a very ancient jurisdiction to grant an injunction (*h*), either at the suit of the owner of the inheritance, or of the mesne remainderman for life (*i*).

Devisee in fee, with executory devise over.

As to executory devises, after some doubts (*k*) it seems to be settled that a devisee in fee, with an executory devise over on his death without leaving issue, may be restrained from equitable, but not from legal waste (*l*), though a testator could make such a tenant impeachable for legal waste by express words (*m*).

Waste by person under adverse title.

Where a plaintiff in possession sought an injunction to restrain waste by a person claiming under an adverse title, the tendency of the Court was to grant the relief prayed, at least when the acts complained of did or might tend to the destruction of the estate (*n*); and now, by Judicature Act, 1873, s. 25, sub-s. 8, such an injunction is expressly placed within the discretion of the Court.

Waste by tenants in common.

Though tenants in common will not in general be restrained from committing either ordinary or equitable waste, equity will interfere between them to prevent malicious or destructive waste—as, for instance, cutting saplings and timber trees or underwood at unseasonable times (*o*). And under special circumstances ordinary waste has been restrained—for instance, where the parties interested were only equitable tenants in common, and the one who was committing the waste not only was not entitled to the possession, but was also insolvent, and un-

(*h*) *Tracy* v. *T.*, 1 Vern. 23.
(*i*) *Dayrell* v. *Champneys*, 1 Eq. Ca. Ab. 400.
(*k*) *Robinson* v. *Litton*, 3 Atk. 309; *Stansfield* v. *Habergham*, 10 Ves. 278.
(*l*) *Turner* v. *Wright*, 1 Johns. 740; 2 De G. F. & J. 234.
(*m*) *Blake* v. *Peters*, 1 De G. J. & S. 345.
(*n*) *Lowndes* v. *Bettle*, 10 Jur. N. S. 226; 12 W. R. 399.
(*o*) *Hole* v. *Thomas*, 7 Ves. 589; *Clegg* v. *C.*, 3 Giff. 322, 336.

able to pay to his co-tenants their shares of the produce of the waste (*p*). After a decree has been made in a partition suit between such tenants, the Court has jurisdiction to restrain waste (*q*).

Under-lessee.

A ground landlord may have an injunction to stay waste against an under-lessee, where the original lessee, by collusion or neglect, does not seek to restrain it (*r*).

(c.) *Equitable remedies.*

Superiority of equitable remedies.

(1.) The jurisdiction of equity in matters of waste is not less due to the superior remedial processes which it commands, than to the broader principles which it applies. At common law, previous to the addition to its power effected by 17 & 18 Vict. c. 125, there existed no power to interfere with the commission of waste generally. The injured party could at most recover damages to indemnify himself after the wrong had been done. On the contrary, equity could always be appealed to where a single act of waste could be established, to interfere by injunction to restrain the offending party from any further acts of like nature; and this whether the waste complained of were legal or equitable (*s*). Again, while common law was hampered in its estimation of damages by the want of the machinery requisite for examining lengthy matters of account, which are the usual concomitants of such suits as those arising from wrongful waste, equity could readily undertake such inquiries, and conduct them to a certain issue.

Account, whether incident only to injunction.

(2.) It was formerly a much disputed question, whether there was any jurisdiction in equity to decree an account where no case lay for an injunction; the objection being that after the waste had been committed the dispute between the parties was only one of pecuniary loss, the complete and proper remedy for which was by action at

(*p*) *Smallman* v. *Onions*, 3 Bro. C. C. 621.

(*q*) *Wright* v. *Atkyns*, 1 V. & B. 313. See *Bailey* v. *Hobson*, 5 Ch. 180.

(*r*) *Farrant* v. *Lovel*, 3 Atk. 723.

(*s*) *Coffin* v. *C.*, 6 Madd. 17.

law. This reasoning was successful in *Jesus College* v. *Bloom* (*t*), and *Smith* v. *Cooke* (*u*), where the jurisdiction to decree an account was considered to arise as an incident of the power to restrain by injunction, and to have no existence where, there being no possibility of a repetition of the offence, an injunction could not be required. But in *Parrot* v. *Palmer* (*x*), the conclusion was reached, which, with the exceptions to be presently referred to, may be accepted as expressing the true principles, viz., that where there was a remedy at law for waste, an account would not be decreed except as incident to an injunction; but that where there was only a remedy in equity, as would always be the case where equitable waste was charged, an account would be granted, although there was no injunction. The importance of the distinction has evidently disappeared since the fusion of legal and equitable remedies by the Judicature Acts.

2. **Injunctions against trespass.**

In many respects analogous to the jurisdiction to restrain waste is that which enables Courts of equity to grant the protection of injunction in certain cases of trespass.

The principles of the jurisdiction are precisely those which govern the whole class of injunctions in aid of legal rights. The Court requires to be assured of the existence of the legal right, that a breach of the right is imminent (*y*), and that irreparable or at least serious damage is likely to result (*z*).

Origin and nature of the jurisdiction.

The jurisdiction to grant relief in cases of mere trespass, as distinguished from waste (in which there is privity of title between the parties), seems to have been first asserted in *Flamang's Case* (*a*), where the plaintiff was in possession of a close, and the defendant was working into his minerals

(*t*) 3 Atk. 262; Amb. 54.
(*u*) 3 Atk. 381.
(*x*) 3 My. & K. 632.
(*y*) *Stannard* v. *Vestry of St. Giles*, 20 Ch. D. 190; 51 L. J. Ch. 629.
(*z*) *Supra*, pp. 761, 762; *Cooper* v. *Crabtree*, 20 Ch. D. 589; 51 L. J. Ch. 544.
(*a*) Cited 6 Ves. 147; 7 Ves. 308,

and taking away the very substance of his estate. It has since been repeatedly asserted in cases falling within the above-mentioned conditions (*b*).

Naked trespass not restrained.

A mere ordinary naked trespass will not be restrained by injunction (*c*). Thus the Court has refused to restrain a person from vexatiously distraining on the tenants of the plaintiff (*d*). But an act not of itself amounting to serious damage may by continuance or repetition be held to come within the remedy of injunction (*e*).

Erection of buildings, when restrained.

If the alleged trespass consists in the erection of works or buildings on the plaintiff's land, an injunction may be had as long as they are in an incomplete state (*f*); but if they have been completed the plaintiff will generally be left to his remedy by damages (*g*). This rule has, however, been departed from and an injunction granted where the conduct of the defendant has been fraudulent, vexatious, or oppressive, and where the trespass has been of an exceptionally serious nature (*h*).

Trespass by public companies.

The remedy of injunction in cases of trespass is more readily granted against public companies or corporations having compulsory statutory powers than against private persons; and generally the plaintiff is not required to show destructive or irreparable damage. An equity is raised on the plaintiff's behalf by the fact of the power and resources commonly enjoyed by such public bodies, the Court being always disposed to keep them strictly within the terms of the authority conferred upon them (*i*). In these cases the inclination to grant the special relief of equity is so strong, that it will only be refused in cases where the damage is so slight as to be almost inappreciable,

(*b*) *Mitchell* v. *Dors*, 6 Ves. 147; *Hanson* v. *Gardiner*, 7 *ibid.* 305; *Gaskin* v. *Balls*, 13 Ch. D. 324.

(*c*) *Mogg* v. *M.*, 2 Dick. 670.

(*d*) *Best* v. *Drake*, 11 Ha. 369; *Aldis* v. *Fraser*, 15 Beav. 220.

(*e*) *L. & N. W. R.* v. *L. & Y. R.*, 4 Eq. 178; *Allen* v. *Martin*, 20 Eq. 465.

(*f*) *Farrow* v. *Vansittart*, 1 Ra. Ca. 602; *Goodson* v. *Richardson*, 9 Ch. 221.

(*g*) *Deere* v. *Cust*, 1 My. & C. 516.

(*h*) *Powell* v. *Aiken*, 4 K. & J. 343; *Bowser* v. *Maclean*, 2 De G. F. & J. 415.

(*i*) Kerr, Inj., p. 120; *Kemp* v. *L. & B. R. Co.*, 1 Ra. Ca. 495.

or where the ordinary legal remedy is evidently adequate and sufficient (*k*). Where the dispute is between two incorporated companies, the same principles apply as in ordinary cases (*l*).

Trespasses affecting public interest.

In cases of trespass, as in those respecting nuisances, if the act complained of affects the public interest, the proper remedy is by information at the suit of the Attorney-General (*m*); and in this case evidence of actual damage is not required (*n*). But if, in addition to the interference with a public right, special damage is done to a private person, he has a right to sue (*o*); so that in such a case there may be both an information and an action (*p*).

Plaintiff must be prompt.

A plaintiff seeking the interference of the Court to restrain a trespass must be prompt in making his application. Relief will be refused if he has stood by and allowed another to spend money on his property upon the faith that no objection will be made (*q*).

Account.

In cases of trespass, as in others, the remedy of account is often incident to that of injunction. This is especially the case in mining suits. The rule in these is that if the plaintiff knew, or with reasonable diligence might have known, of the wrongful taking, the account will be limited to six years (*r*). But in the absence of such knowledge or negligence, or if the defendant has acted wittingly, and *à fortiori* if he has been guilty of concealment or fraud, the account is not so limited (*s*); and the trespasser may be charged the full value of the minerals taken, without allowance for the expense of severing them (*t*). Moreover,

Inquiry as to damages.

(*k*) *Turner* v. *Blamire*, 1 Drew. 409; *River Dun, &c. Co.* v. *N. M. R. Co.*, 1 Ra. Ca. 121.

(*l*) *M. S. & L. R. Co.* v. *G. N. R. Co.*, 9 Ha. 284.

(*m*) *Att.-Gen.* v. *Cleaver*, 18 Ves. 217; *Att.-Gen.* v. *Forbes*, 2 My. & C. 133.

(*n*) *Att.-Gen.* v. *Shrewsbury, &c. Co.*, 21 Ch. D. 752.

(*o*) *Semple* v. *L. & B. R. Co.*, 9 Sim. 209.

(*p*) *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. 304; *Att.-Gen.* v. *U. K. Telegraph Co.*, 30 Beav. 287.

(*q*) *Gordon* v. *Cheltenham R. Co.*, 5 Beav. 229; *Marker* v. *M.*, 9 Ha. 16.

(*r*) *Dean* v. *Thwaite*, 21 Beav. 623; *Dawes* v. *Bagnall*, 23 W. R. 690.

(*s*) *Eccl. Commis.* v. *N. E. R. Co.*, 4 Ch. D. 845.

(*t*) *Philipps* v. *Homfray*, 6 Ch.

an inquiry is often directed with a view to allowing the plaintiff compensation for any damage which may have been done (*u*).

3. **Injunctions against nuisances.**

Nuisance defined.

A nuisance, as distinguished from a trespass, is an act which causes substantial injury to the corporeal or incorporeal hereditaments of other persons unaccompanied by any invasion of the property itself (*x*).

Public and private nuisances distinguished.

In considering the now well established jurisdiction of equity to restrain nuisances, it is in the first place most material to distinguish between private and public nuisances. A private nuisance is one which affects the comfort or enjoyment of only one individual, or, at most, a limited class of individuals. A public nuisance is one which similarly affects all persons who come within the sphere of its operation. The importance of the distinction lies in the fact that in the case of a private nuisance the injured person has a personal right to a civil action for its redress, though it is not in every case that he will be entitled to the special remedy of injunction: the circumstances which warrant this will be presently considered. The proper remedy for a public nuisance, on the other hand, is an information at the suit of the Attorney-General (*y*).

Nuisance both public and private.

If the act complained of is of such a nature as to interfere with the comfort or enjoyment of all within its reach, and at the same time to cause a special and distinct injury to a limited class of persons, it is both a public and private nuisance, and the person causing it is obnoxious to both remedies. The person or persons suffering the special damage may bring an action; and at the same time the Attorney-General may proceed on behalf of the public (*z*)

770; *Llynvi Co.* v. *Brogden*, 11 Eq. 188; *Whitwam* v. *Westminster, &c. Co.*, (1896) 2 Ch. 538; 65 L. J. Ch. 741.

(*u*) *Hunt* v. *Peake*, Johns. 705; *Jegon* v. *Vivian*, 6 Ch. 742.

(*x*) Kerr, Inj., 165.

(*y*) See *Soltau* v. *De Held*, 2 Sim. N. S. 142.

(*z*) *Att.-Gen.* v. *U. K. Telegraph Co.*, 30 Beav. 287.

and may obtain an injunction (*a*). But in order to justify the private action, the injury done to the plaintiff must be of a different character from that which he suffers in common with the public. It does not suffice that from his mere proximity to the nuisance he happens to suffer more inconvenience than others (*b*).

Nuisance or not a question for jury.

It would lead us too far afield here to enter upon an investigation of the extensive subject as to what constitutes a public or private nuisance. Such an inquiry is more appropriate to a treatise on common law. The question of nuisance or no nuisance is eminently one of fact for a jury, and though, by virtue of 25 & 26 Vict. c. 42 (*c*), or under the more recent provisions of the Judicature Acts, it may be tried in the Chancery Division, it involves no distinctively equitable principles. Our concern is merely with those special circumstances which call for the peculiar remedy of injunction.

General principles.

Nor is it necessary here to repeat at length those general conditions, already stated, which are always required by Courts of equity before they will grant this assistance in aid of a legal right. In these as in other cases the plaintiff must show that the legal remedy of damages would not afford an adequate compensation; and this generally requires proof that the injury will be permanent, or constantly recurring, or irreparable (*d*). As in cases of trespass, so here, a mere threatened injury will not generally suffice to call forth the interference of the Court. But if a man insists upon his right to do the act complained of, that is a sufficient ground to justify an injunction, even though no nuisance has been actually committed (*e*); and

(*a*) *Att.-Gen.* v. *Tod-Heatley*, (1897) 1 Ch. 560; 66 L. J. Ch. 275.

(*b*) *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212; *Tottenham District Council* v. *Williamson*, (1896) 2 Q. B. 353; 65 L. J. Q. B. 591.

(*c*) Rolt's Act.

(*d*) *Fishmongers' Co.* v. *East India Co.*, 1 Dick. 163; *Wynstanley* v. *Lee*, 2 Swanst. 335; *Robinson* v. *Kilvert*, 41 Ch. D. 88; 58 L. J. Ch. 342; *Woodhouse* v. *Walker*, 5 Q. B. D. 404; 49 L. J. Q. B. 609; *Jenks* v. *Clifden*, (1897) 1 Ch. 694; 66 L. J. Ch. 398.

(*e*) *Elliott* v. *N. E. R. Co.*, 1 J. & H. 156; 2 De G. F. & J. 423; 10 H. L. 333; *Pennington* v. *Brinsop, &c. Co.*, 5 Ch. D. 769.

there are other cases in which the Court has so interfered before the nuisance has been committed, on clear proof that the act sought to be restrained will inevitably result in injury (*f*).

It now only remains to illustrate the application of the remedy from the cases most usually occurring in practice.

Nuisances affecting houses.

(1.) One large class of cases to which the remedy of injunction is appropriate consists of those in which the right for which protection is sought concerns the enjoyment of dwelling-houses or places of manufacture or business.

Generally.

With respect to such cases generally, it must be observed that there exists no hard and fast line by which to determine whether or not an act amounts to a nuisance. This depends upon the circumstances of the case; for instance, the purpose for which the house is used, and the character of the neighbourhood. An act may amount to an actionable injury to a dwelling-house which would not be so with respect to a manufactory; and an act may be deemed a nuisance in a sanatorium which would not be so in the vicinity of wharves (*g*). Moreover, the question will not be determined by the standard of persons of elegant and dainty habits, but by the simple notions of those in ordinary life (*h*). Where a case of irreparable injury to health or trade is established, an injunction will be granted. Of course, there is a marked distinction between cases which rest on the allegation of nuisance and those which are based on breach of covenant or other contract. The remedy might well be granted in the latter case, when it would have been refused in the former (*i*).

(*f*) *Haines* v. *Taylor*, 2 Ph. 209; *Dawson* v. *Paver*, 5 Ha. 430. Cf. *Att.-Gen.* v. *Manchester Corp.*, (1893) 2 Ch. 87; 62 L. J. Ch. 459.

(*g*) *Jackson* v. *D. of Newcastle*, 3 De G. J. & S. 284; *Kelk* v. *Pearson*, 6 Ch. 811.

(*h*) *Walter* v. *Selfe*, 4 De G. & S. 322; *Cooper* v. *Crabtree*, 20 Ch. D. 589; 51 L. J. Ch. 544; *Christie* v. *Davey*, (1893) 1 Ch. 316; 62 L. J. Ch. 339; *Robinson* v. *Kilvert*, 41 Ch. D. 88.

(*i*) Cf. *Christie* v. *Davey*, *sup.*; and *Wauton* v. *Coppard*, (1899) 1 Ch. 92; 68 L. J. Ch. 8; *Tod-Heatley* v. *Benham*, 40 Ch. D. 80; 58 L. J. Ch. 83.

Ancient lights.

A multitude of cases falling within this class concern the right to light and air. A right to the free passage of light and air may be acquired by grant, express or implied (*k*), or by agreement (*l*), or by enjoyment for such time and under such circumstances as will satisfy the Prescription Act (*m*); and when so acquired a substantial interference therewith is actionable. But in order to be so it must be sufficient in degree to constitute a real injury, and not mere inconvenience to the plaintiff, a question of difficulty which of course no general expressions can decide (*n*); and practically speaking, when the injury is sufficient to warrant an action at law, an injunction may be obtained in equity (*o*), except in cases in which the remedy of damages would be clearly sufficient.

General rule as to distance.

The Court will not usually restrain the erection of a building the height of which above the ancient light is not greater than the distance between the building and the light (*p*). The fact of the building being at such a distance was formerly regarded as *primâ facie*, but not conclusive, evidence that it would not cause a sufficient interference with the light to warrant an injunction. In such cases the Court would only restrain the building on special evidence of injury (*q*). But it has recently been questioned whether any force is to be attributed to this rule (*r*).

No right to prospect.

There is no easement in English law corresponding to

(*k*) See *Birmingham, &c. Co.* v. *Ross*, 38 Ch. D. 295; 57 L. J. Ch. 601; *Myers* v. *Catterson*, 43 Ch. D. 470; 59 L. J. Ch. 315; *Broomfield* v. *Williams*, (1897) 1 Ch. 602; 66 L. J. Ch. 305; *Pollard* v. *Gare*, (1901) 1 Ch. 834; 70 L. J. Ch. 404; and Conv. Act, 1881 (44 & 45 Vict. c. 41), s. 6 (2).

(*l*) *Wilson* v. *Queen's Club*, (1891) 3 Ch. 522; 60 L. J. Ch. 698.

(*m*) 2 & 3 Will. IV. c. 71. See *Russell* v. *Watts*, 10 App. C. 90.

(*n*) *Back* v. *Stacey*, 2 Car. & P. 465; *Lazarus* v. *Artistic Photographie Co.*, (1897) 2 Ch. 214; 66 L. J. Ch. 522; *Warren* v. *Brown*, (1900) 2 Q. B. 698; 69 L. J. Q. B. 842; (1902) 1 K. B. 15.

(*o*) *Leech* v. *Schweder*, 9 Ch. 476; *Greenwood* v. *Hornsey*, 33 Ch. D. 471; *Jordeson* v. *Sutton, &c. Gas Co.*, (1899) 2 Ch. 217; 67 L. J. Ch. 666.

(*p*) *Beadel* v. *Perry*, 3 Eq. 466.

(*q*) *City of London Brewery Co.* v. *Tennant*, 9 Ch. 212; *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282.

(*r*) *Home and Colonial Stores* v. *Colls*, (1902) 1 Ch. 302.

the servitude *ne prospectui officiatur* in Roman law. However much the obstruction of a view may interfere with the enjoyment or depreciate the value of property, it affords no ground for an action (*s*). *A fortiori*, the mere unsightliness of a building (*t*), or the fact that it overlooks grounds previously private, gives no title to legal or equitable relief (*u*). And though the easement above referred to is commonly described as a right to light and air, there seems to be no case in which an obstruction to the free passage of air has been made the basis of an action, or has been seriously considered in the estimation of damages. It has been said that it is only in very rare and special cases, involving danger to health, or at least something very nearly approaching to it, that the Court would be justified in interfering on the ground of diminution of air (*x*). The right seems limited to access of air through a definite channel or aperture (*y*).

Right to air.

Pollution of air.

The right to *purity* of air is an easement of quite a different kind, quite independent of grant or prescription; and any considerable pollution thereof is a nuisance which may be restrained (*z*). It depends greatly on the locality what degree of interference will be sufficient to ground an action. In any case there must be a sensible and real damage inflicted. A right to carry on an offensive trade may be acquired by prescription, but no length of time can legalise a public nuisance (*a*).

Noises.

If, again, real damage or great inconvenience is occasioned by the carrying on of a noisy trade or otherwise causing excessive noise or vibration, an action may be brought and an injunction obtained to restrain its continu-

(*s*) *Aldred's Case*, 9 Co. 58 *a*; *Potts* v. *Smith*, 6 Eq. 315.

(*t*) *Att.-Gen.* v. *Doughty*, 2 Ves. jr. 453.

(*u*) *Jones* v. *Tapling*, 12 C. B. N. S. 842.

(*x*) *Per* Lord Selborne, 9 Ch. 221; and see *Radcliffe* v. *D. of Portland*, 3 Giff. 702.

(*y*) *Aldin* v. *Clarke & Co.*, (1894) 2 Ch. 437; 63 L. J. Ch. 601; *Chastey* v. *Ackland*, (1895) A. C. 155; 64 L. J. Q. B. 523.

(*z*) *Aldred's Ca., sup.*; *St. Helens Smelting Co.* v. *Tipping*, 11 H. L. 642; *Sellors* v. *Matlock Bath*, 14 Q. B. D. 928.

(*a*) *Weld* v. *Hornby*, 7 East, 199.

ance. Here, again, the decision depends greatly on the locality; and each case must be decided on its own circumstances (*b*). It has been held that the acts of two or more persons taken together may constitute a nuisance which will be restrained, though the separate acts of the contributing parties might be so inappreciable as not to warrant interference (*c*).

Rights to lateral support of land;

(2.) Another extensive and important class of cases rests on the right of a landowner to the lateral support of his land in its natural state. This right is a common law right altogether independent of prescription. He may therefore restrain his neighbour from so digging into the adjacent soil as to cause a subsidence of the surface of his land. No action lies until damage has actually been done; but when this has happened, it is no defence to show that the works causing the damage have been carried on with care and skill (*d*).

of buildings.

But the right to the support of a building by the adjacent soil of an adjacent owner is of a different nature. This is not a natural right of property; it is an easement which can only be acquired by prescription from the time of legal memory, or by grant express or implied (*e*). It may, moreover, be acquired by the circumstance that the building has stood for twenty years, if during that period the owner of the adjacent soil knew, or might have known, that the building was thereby supported and was capable of making a grant; and after twenty years' enjoyment in point of fact the claim to the right will not be defeated by proof that no grant of the easement was ever made (*f*).

(*b*) See *Gaunt* v. *Finney*, 8 Ch. 8; *Ball* v. *Ray*, *ibid.* 467; *Reinhardt* v. *Mentasti*, 42 Ch. D. 685; 58 L. J. Ch. 787; *Christie* v. *Davey*, (1893) 1 Ch. 316; 62 L. J. Ch. 339.

(*c*) *Lambton* v. *Mellish*, (1894) 3 Ch. 163; 63 L. J. Ch. 929.

(*d*) *Hunt* v. *Peake*, John. 710; *Trinidad Asphalte Co.* v. *Ambard*, (1899) A. C. 594; 68 L. J. P. C. 114; and see *Jordeson* v. *Sutton, &c. Gas Co.*, (1899) 2 Ch. 217; 68 L. J. Ch. 457.

(*e*) *Tone* v. *Preston*, 24 Ch. D. 739; 53 L. J. Ch. 50; *Rigby* v. *Bennett*, 21 Ch. D. 559.

(*f*) *Angus* v. *Dalton*, 4 Q. B. D. 162; 6 App. C. 740; 50 L. J. Q. B. 689; *Lemaitre* v. *Davis*, 24 Ch. D. 287; 51 L. J. Ch. 173.

Rights respecting water,

(3.) Another large class of nuisances which often provoke equitable interference, relates to rights respecting water. All acts done by a man on his own land, whereby the rights of his neighbour respecting water are injuriously affected, or whereby water becomes a cause of damage to the land of his neighbour, are considered as nuisances relating to water (*g*).

We cannot digress into a particular account of the various rights to water. They may be conveniently classified as rights respecting quantity, and rights respecting quality.

as to quantity,

The riparian proprietors have a right to the use of the water which flows by their land, and this right is incident to the ownership of the adjacent soil. And the right being enjoyed by the successive proprietors along the bank, none may so interfere with the water as to prejudice those above or below him, unless, of course, he has some special title to exclusive enjoyment. He may therefore be restrained from diverting the stream, or materially diminishing the quantity which would naturally flow to his neighbours below (*h*); or, on the other hand, from damming back the stream so as to cause an overflow on the land of his neighbour above him.

and quality.

Secondly, a riparian proprietor has a right to a natural stream in a natural state of purity. He may therefore restrain the fouling of the water, and this without even proof of actual injury (*i*). And it is immaterial that the stream was previously in some degree polluted. The right is as clear to prevent an increase of pollution as to prevent pollution in the first instance (*i*).

Artificial watercourses.

The rights respecting artificial watercourses must, however, be carefully distinguished from the above. The

(*g*) Kerr, Inj., p. 224; *Ballard* v. *Tomlinson*, 29 Ch. D. 115; 54 L. J. Ch. 454.

(*h*) *Ferrand* v. *Corp. of Bradford*, 21 Beav. 412. See also *Bradford Corp.* v. *Pickles*, (1895) A. C. 587; 64 L. J. Ch. 759.

(*i*) *Crossley* v. *Lightowler*, 2 Ch. 478; *Pennington* v. *Brinsop, &c. Co.*, 5 Ch. D. 772.

water in an artificial stream is the property of the person by whom it is created or caused to flow. In the absence of long enjoyment he has no right to discharge it on the land of another; while his neighbour cannot claim the continuance of the flow, notwithstanding that a right to discharge it may have been acquired by the producer (*k*).

Navigable rivers.

The public rights in navigable rivers are likewise frequently protected by means of the remedy of injunction. These rights may be infringed either by buildings, &c. which interfere with the public right of navigation, or by the fouling of rivers in such a manner as to be injurious to the public health, or destructive of a fishery (*l*); and where a sufficient case of injury is established the nuisance may be restrained at the suit of the Attorney-General.

Other nuisances.

It must suffice merely to mention other extensive classes of nuisances which are dealt with on the principles already amply expounded; for instance, obstructions of public highways and private rights of way, obstructions of the seashore and of ferries, markets, commons, &c.

Nuisances authorised by statute.

Before dismissing the subject of nuisances, it must be observed that when a statutory power has been conferred to do an act which otherwise might have been actionable, the person so protected is not amenable to the process of the Court as long as he confines himself strictly to the limits of the power conferred upon him. The unlawful character of the act is taken away by the sanction of the legislature, however injurious it may be (*m*). Such powers when conferred must, however, be strictly complied with. Any injurious act which is not covered by their provisions brings the offender at once within the reach of the law (*n*).

(*k*) Kerr, Inj. 235.

(*l*) See *Att.-Gen.* v. *Lonsdale*, 7 Eq. 388; *Att.-Gen.* v. *Terry*, 9 Ch. 423; *Att.-Gen.* v. *Mayor, &c. of Kingston-upon-Thames*, 34 L. J. Ch. 481; *Bridges* v. *Highton*, 11 L. T. N. S. 653.

(*m*) *Rex* v. *Pease*, 4 B. & A. 30; *London & Brighton Ry.* v. *Truman*, 11 App. C. 45; 55 L. J. Ch. 354; *National Telephone Co.* v. *Baker*, (1893) 2 Ch. 186; 62 L. J. Ch. 699; *Harrison* v. *Southwark, &c. Water Co.*, (1891) 2 Ch. 409; 60 L. J. Ch. 630.

(*n*) *Att.-Gen.* v. *Leeds Corp.*, 5 Ch. 591; *Clowes* v. *Staffordshire Potteries Co.*, 8 Ch. 139; *Metrop.*

But where the legislature has pointed out another mode of procedure for the redressing of a wrong, the Court will not, unless it be under very special circumstances, grant an injunction (*o*).

4. **Injunctions against libel, &c.**

Crimes not restrained.

Abundant illustrations have been given of the application of the remedy of injunction to restrain the commission of torts. Moreover, it is clear that equity will not interfere by injunction to restrain the commission of a crime. But there is a class of offences which partakes both of the nature of a tort and of that of a crime, inasmuch as a breach of the rights to which they refer renders the offender at once liable to a civil action and to criminal proceedings. The most conspicuous illustration of such offences is afforded by cases of libel; and it is necessary to inquire whether or not equity will interfere by injunction in such cases.

Libel, when restrained.

Since the last edition of this work a series of decisions has shown a disposition to somewhat extend the principles which were previously understood to apply to cases of libel. It was formerly considered that the remedy of injunction was only applicable when the libel in question threatened injury to property or trade (*p*); and it is still true that in such cases this relief is more readily accorded than in others (*q*); though even so it is not every threatened injury to trade which will be restrained (*r*). But it is now established that in proper circumstances,

Asylum v. *Hill*, 6 App. C. 193; 50 L. J. Ch. 353; *Rapier* v. *Lond. Tramways Co.*, (1893) 2 Ch. 588; 63 L. J. Ch. 36; *Ogston* v. *Aberdeen Tramways Co.*, (1897) A. C. 111; 66 L. J. P. C. 1.

(*o*) *Grand Junction Waterworks* v. *Hampton, &c. Council*, (1898) 2 Ch. 331; 67 L. J. Ch. 603.

(*p*) *Mulkern* v. *Ward*, 13 Eq. 619; *Prudential Ass. Co.* v. *Knott*, 10 Ch. 142.

(*q*) *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. D. 763; *Quartz Hill, &c. Co.* v. *Beall*, 20 Ch. D. 501; 51 L. J. Ch. 874; *Hill* v. *Hart-Davies*, 21 Ch. D. 798; 51 L. J. Ch. 845; *Hayward* v. *H.*, 34 Ch. D. 198; 56 L. J. Ch. 287.

(*r*) *Collard* v. *Marshall*, (1892) 1 Ch. 571; 61 L. J. Ch. 268; *Mellin* v. *White*, (1895) A. C. 154; 64 L. J. Ch. 308; *Salomans* v. *Knight*, (1891) 2 Ch. 294; 60 L. J. Ch. 743.

that is to say, where the remedy in damages would be insufficient, an injunction interlocutory or final may be granted apart from any consideration of damage to trade or property (*s*). The cases cited, however, show that the jurisdiction is to be carefully exercised and only in special circumstances. Even an oral slander, which is detrimental to the business of the plaintiff, may be restrained by injunction (*t*). On similar grounds a conspiracy calculated to injure a person in his trade may be the subject of injunction where irreparable damage is threatened (*u*); but it is necessary to show that the defendants are committing an illegal act. The fact that the combination may injure other traders is not sufficient (*x*).

II. *Injunctions protecting Patent Rights, Copyright, Trade Marks, and Goodwill.*

Grounds of the jurisdiction.

It is convenient to class together the rights here mentioned, since though they are in themselves strongly contrasted, the jurisdiction of equity respecting them rests on the same foundation, namely, the desirability of preventing a multiplicity of suits and vexatious litigation.

Inadequacy of the remedy at law.

The rights in themselves are fully recognised at law, and have always sufficed to ground an action at law for damages. But it is evident that such a remedy supplies an exceedingly inadequate protection. Not only might the patentee, or author, or owner of a trade mark be com-

(*s*) *Monson* v. *Tussaud*, (1894) 1 Q. B. 671; 63 L. J. Q. B. 454; *Bonnard* v. *Perryman*, (1891) 2 Ch. 269; 60 L. J. Ch. 217; *Coats* v. *Chadwick*, (1894) 1 Ch. 347; 63 L. J. Ch. 328; *Pollard* v. *Photographic Co.*, 40 Ch. D. 354; 58 L. J. Ch. 251.

(*t*) *Hermann Loog* v. *Bean*, 26 Ch. D. 306; 53 L. J. Ch. 1128.

(*u*) *Walters* v. *Green*, (1899) 2 Ch. 696; 68 L. J. Ch. 730; *Lyons* v. *Wilkins*, (1899) 1 Ch. 255; 68 L. J. Ch. 146.

(*x*) *Mogul Steamship Co.* v. *McGregor*, (1892) A. C. 25; 61 L. J. Q. B. 295; *Huttley* v. *Simmons*, (1898) 1 Q. B. 181; 67 L. J. Q. B. 213.

pelled to bring innumerable actions, and thus be ruined by interminable litigation, but in many cases damages, even if recovered, would afford an insufficient redress for the injury sustained. The business or the reputation might be impaired by the interference pending the litigation, in a manner and to an extent which no inquiry could ascertain (*y*). And further, the facility for taking accounts afforded by equity, and yet more conspicuously its power of peremptorily stopping the infringement of the right by injunction, plainly indicate the appropriateness of the jurisdiction of its Courts for dealing with such matters.

It must suffice very briefly to describe the rights themselves here under review, the particular object being to ascertain under what circumstances an aggrieved party can obtain an injunction against an infringement of them.

1. Patent Rights.

Origin of patents.

(1.) The abuse of the royal prerogative of granting patents for monopolies, and the disputes which arose therefrom, are well-known matters of English history, and need not be here recapitulated (*z*). Suffice it to say, that the result thereof was the statute 21 Jac. I. c. 3, which abolished the general power of granting monopolies and patents, but by express reservation excepted the power of granting letters patent for the term of fourteen years or under to the inventor of any *new manufacture*, provided it were not contrary to law nor mischievous to the State (*a*). On this statute alone the legality of patent rights as enjoyed by inventors rested for many years.

21 Jac. I. c. 3.

It has been followed by various enactments passed from time to time for the amendment of the law, and finally by the Patents, Designs, and Trade Marks Act of 1883, and the amending Acts of 1885, 1886, 1888 and 1901 (*b*), to

(*y*) *Hogg* v. *Kirby*, 8 Ves. 223.
(*z*) See *Mompesson's Case*, 2 How. St. Tr. 1119.
(*a*) S. 6.
(*b*) 46 & 47 Vict. c. 57; 48 & 49 Vict. c. 63; 49 & 50 Vict. c. 37; 51 & 52 Vict. c. 50; 1 Edw. VII. c. 18.

which the student must now resort for a full statement of the present law on the subject.

The first question which arises is as to what may be the subject of the right.

"Manufactures."

It is to be observed that the Statute of James uses only the term "manufacture," and neither this nor the succeeding statutes have at all enlarged the right as previously existing at common law. The subject-matter of a patent must therefore come within this term, and must be for a legal purpose. It would be supererogatory to trace the course of the decisions by which these conditions are now in some degree defined: it is sufficient to briefly summarise their results.

What comprehended.

The word "manufacture" has indeed received a liberal interpretation, and not only comprehends anything made, but also the mode, method or process of making; it comprises, therefore, not only vendible articles, the result of chemical or mechanical processes, but new machines or new combinations of machinery, or an improvement of an old process (*c*).

No patent obtainable for a mere principle.

It is, however, to be particularly observed that a bare principle cannot be the subject of a patent. For instance, no one could obtain a patent for the mere idea of utilising electricity as a motor power (*d*). The discovery of a principle is not an invention in the sense of patent law. The means must be shown of practically applying the principle (*e*). This distinguishes a principle from a process.

Novelty necessary.

Secondly, the invention must be new. It is not indeed necessary that the object produced should be of a species unknown before, but the process of making it must be the true and original invention of the person seeking protection; original not only in the sense that he derived it from no one, but in the sense that no one had used it before (*f*).

(*c*) Kerr, Inj. 282; Johnson's Pat. Man. 7th ed. 5; *Crane* v. *Price*, 4 Mac. & G. 580; *Ralston* v. *Smith*, 11 H. L. 223.

(*d*) *Jupe* v. *Pratt*, 1 W. P. C. 145; *Dangerfield* v. *Jones*, 13 L. T. N. S. 142.

(*e*) *Boulton* v. *Bull*, 2 H. Bl. 463.

(*f*) *Tennant's Case*, Dav. on Pat. 429; *United Telephone Co.* v. *Harrison*, 21 Ch. D. 720; 51 L. J. Ch. 705.

Previous sale even by the inventor himself would avoid the patent (*g*). Previous user beyond the realm or in the colonies is no objection to a patent (*h*).

The present statutes provide under certain conditions that the exhibition of an invention at an industrial or international exhibition shall not prejudice patent rights (*i*). *Primâ facie* a patentee is not the first inventor if before the date of the patent an intelligible description of the invention in English or any other well-known language, is shown to have existed in this country (*k*); but the presumption may be rebutted by evidence that the existence of such a description was not in fact known, or that it could not have been seen by anyone who could understand it (*l*).

Utility.

Thirdly, it must be useful; but this word is applied with considerable latitude (*m*). It is not confined to abstract, or comparative, or competitive or commercial utility (*n*).

Procedure.

These are, briefly stated, the conditions which determine what may be the subject of a patent right. But not only must the matter for which protection is sought fall within these conditions; the inventor must also, in order to procure patent privilege, closely follow the procedure laid down by the statutes above referred to.

What amounts to infringement.

(2.) A patent is infringed when a man directly or indirectly uses the protected invention, or produces the same result by means only colourably different. Similarity in principle between two machines will not constitute an infringement, if the mode of operation is different, though the same result may be attained (*o*); nor is there an in-

(*g*) *Wood* v. *Zimmer*, 1 Holt, N. P. C. 58.

(*h*) *Edgeberry* v. *Stephens*, 2 Salk. 447; *Rolls* v. *Isaacs*, 19 Ch. D. 268; 51 L. J. Ch. 170.

(*i*) 46 & 47 Vict. c. 57, s. 39; 49 & 50 Vict. c. 37, s. 3.

(*k*) *Pickard* v. *Prescott*, (1892) A. C. 263; *Anglo-American Brush, &c. Corp.* v. *King*, (1892) A. C. 367.

(*l*) *Harris* v. *Rothwell*, 35 Ch. D. 416; 56 L. J. Ch. 459; distinguishing *Otto* v. *Steel*, 31 Ch. D. 241; 55 L. J. Ch. 196.

(*m*) *Manton* v. *Parker*, Dav. P. C. 327. See *Badische Anilin, &c.* v. *Levinstein*, 29 Ch. D. 366; 12 App. C. 710.

(*n*) *Welsbach, &c. Co.* v. *New Incandescent, &c. Co.*, (1900) 1 Ch. 843; 69 L. J. Ch. 343.

(*o*) *Seed* v. *Higgins*, 8 H. L. 550; cf. *Saccharin Corp.* v. *Quincey*, (1900) 2 Ch. 246; 69 L. J. Ch. 530.

fringement in the application of a patented machine to a different purpose from that for which it was patented (*p*). It is an infringement to offer patented articles for sale, though no sale takes place (*q*), or to buy or sell in the way of trade articles made by a machine which is itself an infringement (*r*). Whether the mere importation of patented articles is an infringement or not depends on where the contract of sale was completed (*s*). It is immaterial whether there is or is not an intention to infringe (*t*); and ignorance of the existence of the patent is no answer (*u*).

(3.) Such being a brief review of the nature and conditions of patent right, we may now intelligibly observe the application for its protection of the equitable remedies. Remedies.

i. The injunctions sought in patent cases are usually of the interlocutory species. One of the leading authorities on the principles of the Court respecting them is *Hill* v. *Thompson* (*x*), which not only substantiates and illustrates what has been above stated as regards the necessity for novelty and utility in the invention (*y*), but also clearly expresses the circumstances under which an injunction would be granted. From that case it appears that with respect to patents which have been for a long time in the exclusive enjoyment of the plaintiff, equity would presume an exclusive right, and would restrain a defendant from infringement thereof without requiring him to establish its validity at law, but that in the case of recently granted patents it would not interpose by injunction until the right had been established by law (*z*). But Injunction. When obtainable.

(*p*) *Newton* v. *Vaucher*, 6 Ex. 859.

(*q*) *Oxley* v. *Holden*, 8 C. B. N. S. 666.

(*r*) *Wright* v. *Hitchcock*, L. R. 5 Ex. 38.

(*s*) *United Telephone Co.* v. *London, &c. Telephone Co.*, 26 Ch. D. 774; 53 L. J. Ch. 1158; compare *Nobel's Explosives Co.* v. *Jones*, 8 App. C. 1; 52 L. J. Ch. 339; *Badische Anilin* v. *Basle Chemical Works*, (1898) A. C. 200; 67 L. J. Ch. 141; *Saccharin Corp.* v. *Reitmeyer*, (1900) 2 Ch. 659; 69 L. J. Ch. 761; *British Motor Syndicate* v. *Taylor*, (1901) 1 Ch. 122; 70 L. J. Ch. 21.

(*t*) *Heath* v. *Unwin*, 15 Sim. 552; *United Telephone Co.* v. *Sharples*, 29 Ch. D. 164; 54 L. J. Ch. 633.

(*u*) *Curtis* v. *Platt*, 3 Ch. D. 138, n.

(*x*) 3 Mer. 622.

(*y*) At p. 629.

(*z*) See also *Univ. of O. & C.* v. *Richardson*, 6 Ves. 689; *Mawman* v. *Tegg*, 2 Russ. 385.

if a good *primâ facie* case is made out the Court has jurisdiction to interfere notwithstanding the recency of the patent (*a*). The plaintiff must in any case show *both* a *primâ facie* title to the patent, and a *primâ facie* case of infringement (*b*).

When the legal right must be established.

If the Court is satisfied of the validity of the patent and of the fact of the infringement, it may grant an injunction at once without requiring the plaintiff to establish his legal right; but it will rarely do this if either the validity of the patent or the fact of infringement is denied. In such cases the Court will usually put the plaintiff to a trial of the right, either in the meanwhile protecting him by interim injunction, or ordering the motion to stand over until the right has been tried; the defendant meanwhile keeping an account, and the plaintiff giving an undertaking as to damages. The Court will, in its discretion, follow whichever of these courses appears most convenient under the circumstances of the case (*c*).

Proper diligence required.

A plaintiff who seeks the aid of the Court must apply with proper diligence. Any open encouragement or acquiescence in the invasion of his right, especially knowingly permitting the defendant to expend moneys upon the faith of non-interference, will bar his right to the extraordinary interference of equity (*d*).

Injunction against threats.

The present Act provides that if a person claims to be a patentee, and by circulars or otherwise threatens legal proceedings on the ground of his alleged patent, a person aggrieved by such threats may bring an action and obtain an injunction against the continuance thereof, unless the *soi-disant* patentee with due diligence commences and prosecutes an action for infringement (*e*). A private letter has

(*a*) *Plimpton* v. *Spiller*, 4 Ch. D. 286.

(*b*) *Bridson* v. *Macalpine*, 8 Beav. 230; *Caldwell* v. *Vanvlissengen*, 9 Ha. 424; *Bickford* v. *Skewes*, 4 My. & Cr. 500.

(*c*) Kerr, Inj. 274; *Bacon* v. *Jones*, 4 My. & Cr. 436; *Renard* v. *Levinstein*, 2 H. & M. 628; *Plimpton* v. *Malcolmson*, 20 Eq. 37; *Plimpton* v. *Spiller*, *&c. sup.*, *Badische*, *&c. Fabrik* v. *Levinstein*, 12 App. C. 710.

(*d*) *Bridson* v. *Benecke*, 12 Beav. 1; *Bovill* v. *Crate*, 1 Eq. 388.

(*e*) 46 & 47 Vict. c. 57, s. 32;

been deemed sufficient to authorise proceedings thereunder (*f*).

2. **Copyright.**

Origin of the right.

(1.) It is now established that copyright exists only by statute (*g*). The term designates the exclusive right of multiplying a work of literature or art after its publication (*h*). The right commences by publication (*i*), and the publication must be in this country (*k*).

Various species of copyright.

There are many different species of copyright, differing in accordance with the nature of the subject-matter to which it refers.

Literary copyright, 5 & 6 Vict. c. 45.

Literary copyright is regulated by the statute 5 & 6 Vict. c. 45, which defines it to be the sole exclusive liberty of printing or otherwise multiplying copies of any subject included in the word "book" as therein comprehensively defined. Copyright in books published in the lifetime of the author is the property of the author, or his assigns, during his life and seven years afterwards, or for forty-two years, if the latter be the longer term. The copyright in books published after the author's death lasts for forty-two years (*l*).

What may be subject thereof.

To come within the protection of the Copyright Acts, a work need not consist of new or original matter. A compilation of old materials, or materials open to the research of all men, may be the subject of copyright. Thus, copyright may exist in a directory (*m*), a calendar (*n*), a newspaper (*o*), or a catalogue (*p*). But there can be no copy-

Colley v. *Hart*, 44 Ch. D. 179; 59 L. J. Ch. 308; *Barrett* v. *Day*, 43 Ch. D. 435; 59 L. J. Ch. 464; *Johnson* v. *Edge*, (1892) 2 Ch. 1; 61 L. J. Ch. 262.

(*f*) *Driffield, &c. Co.* v. *Waterloo, &c. Co.*, 31 Ch. D. 638; 55 L. J. Ch. 391; *Barney* v. *United Telephone Co.*, 28 Ch. D. 394; *Combined Weighing, &c. Co.* v. *Automatic, &c. Co.*, 42 Ch. D. 665; 58 L. J. Ch. 709; *Skinner* v. *Shew*, (1894) 1 Ch. 581; 63 L. J. Ch. 826.

(*g*) *Jefferys* v. *Boosey*, 4 H. L. 833.

(*h*) *Ib.* 920.

(*i*) *Ib.* 815.

(*k*) *Routledge* v. *Low*, 3 *ib.* 100.

(*l*) S. 3.

(*m*) *Kelly* v. *Hooper*, 4 Jur. 21. And see *Leslie* v. *Young*, (1894) A. C. 335; *Lamb* v. *Evans*, (1893) 1 Ch. 218; 62 L. J. Ch. 404.

(*n*) *Longman* v. *Winchester*, 16 Ves. 269.

(*o*) *Walter* v. *Howe*, 17 Ch. D. 708; 50 L. J. Ch. 621; 44 & 45 Vict. c. 60.

(*p*) *Hotten* v. *Arthur*, 1 H. & M.

right in a book the publication of which is illegal on the ground of immorality, indecency, sedition, or blasphemy (*q*); and it appears that copyright will not be recognised in a mere title or name (*r*). A right of property may be recognised in unpublished information and the piracy thereof restrained (*s*).

Copyright in articles contributed to encyclopædias, magazines or other periodical publications is especially regulated by sect. 18 of the Act, which provides that the copyright therein shall on payment (*t*) be the property of the proprietor of the publication for twenty-eight years, and that from that time the right of publishing the articles in a separate form shall revert to the author for the remainder of the period given by the Act.

Lectures, 5 & 6 Will. IV. c. 65.

It was held in *Abernethy* v. *Hutchinson* (*u*), that a lecturer is entitled to copyright in lectures delivered to his pupils. Such delivery to a private audience is distinguished from a public address (*x*). Special protection is afforded to the rights of lecturers under certain conditions by statute (*y*). The report of a speech in which the speaker claims no right is protected, the reporter being deemed to be "an author" (*z*).

Private letters.

As to private letters, it was decided in a case of some celebrity in the history of literature (the litigation being between Alexander Pope and his publisher) that generally speaking the writer may restrain their publication by the person to whom they are addressed, or by any third

603; *Grace* v. *Newman*, 19 Eq. 624; *Ager* v. *P. & O. Co.*, 26 Ch. D. 637; 53 L. J. Ch. 589.

(*q*) *Stockdale* v. *Onwhyn*, 5 B. & C. 173; *Walcot* v. *Walker*, 7 Ves. 1; *Southey* v. *Sherwood*, 2 Mer. 435; *Baschet* v. *London, &c. Standard Co.*, (1900) 1 Ch. 73; 69 L. J. Ch. 35.

(*r*) *Dicks* v. *Yates*, 18 Ch. D. 76; 50 L. J. Ch. 809; *Kelly* v. *Byles*, 13 Ch. D. 682; *Schove* v. *Schminke*, 33 *ib.* 546; 55 L. J. Ch. 892; *Licensed Victuallers', &c. Co.* v. *Bingham*, 38 Ch. D. 139; 58 L. J. Ch. 36; but see also *Weldon* v. *Dicks*, 10 Ch. D. 247.

(*s*) *Exchange Telegraph Co.* v. *Gregory*, (1896) 1 Q. B. 147; 65 L. J. Q. B. 62; *Exchange Telegraph Co.* v. *Central News*, (1897) 2 Ch. 48; 66 L. J. Ch. 672.

(*t*) *Collingridge* v. *Emmott*, 57 L. T. R. 864.

(*u*) 1 H. & Tw. 40.

(*x*) *Caird* v. *Sime*, 12 App. C. 326; 57 L. J. P. C. 2.

(*y*) 5 & 6 Will. IV. c. 65.

(*z*) *Walter* v. *Lane*, (1900) A. C. 539; 69 L. J. Ch. 699.

party (*a*), and the person receiving a letter may restrain its publication by a stranger (*b*). But these rights are liable to be qualified by considerations of public policy, or by some personal equity (*c*). The publication of unpublished manuscripts may clearly be restrained by the persons to whom they belong (*d*).

What amounts to infringement.

(2.) It is not possible here to do more than cursorily glance at the wide and intricate subject of the infringement of copyright; neither is it possible to indicate by general expressions what amounts to an infringement. A subsequent writer may, of course, make references to and quotations from a prior publication; but he may not do so to such an extent as to sensibly diminish the value of the original (*e*). The question is whether a material and substantial part of the prior work has been taken (*f*), and it is evident that the solution of this will often be extremely difficult. Especially is this the case where the pirated work is, like a calendar or directory, compiled from materials open to every one. In such cases similarity approaching almost to identity is inevitable, and almost the only means by which the fact of piracy can be sustained is by showing a community of errors. A *bonâ fide* abridgment of a book is not piracy (*g*); but here again the difficulty is great in drawing the line between good and bad faith. The tendency of modern decisions is to restrict rather than to extend the latitude allowed in some of the earlier cases in this respect (*h*).

General view.

Dramatic and musical copyright.

(3.) Copyright in dramatic and musical pieces differs in many respects from purely literary copyright. Literary

(*a*) *Pope* v. *Curl*, 2 Atk. 342; *Gee* v. *Pritchard*, 2 Swanst. 402.

(*b*) *Granard* v. *Dunkin*, 1 Ba. & Be. 207; *Thompson* v. *Stanhope*, Amb. 737.

(*c*) *Percival* v. *Phipp*, 2 V. & B. 19; Drew. Inj. 208, 209.

(*d*) *Queensberry* v. *Shebbeare*, 2 Eden, 329; *Prince Albert* v. *Strange*, 1 Mac. & G. 25.

(*e*) *Scott* v. *Stanford*, 3 Eq. 718; *Walter* v. *Steinkopff*, (1892) 3 Ch. 489; 61 L. J. Ch. 521.

(*f*) *Chatterton* v. *Cave*, 3 App. C. 483; 2 C. P. D. 42.

(*g*) *Newbery's Case*, Lofft, R. 775; *Dickens* v. *Lee*, 8 Jur. 184; *Chatterton* v. *Cave*, *sup.*

(*h*) *Tinsley* v. *Lacy*, 1 H. & M. 747; *Dickens* v. *Lee*, *sup.*; *Warne* v. *Seebohm*, 39 Ch. D. 73; 57 L. J. Ch. 689.

copyright extends only to the multiplication of copies, but this being an insufficient protection for dramatic authors and composers, restrictions on public representation and performance have been provided in addition by 3 & 4 Will. IV. c. 15, 5 & 6 Vict. c. 45, and 45 & 46 Vict. c. 40; and the first public representation or performance is, in respect of such works, equivalent to publication (*i*). Public representation or performance of such a work, or of a material and substantial part thereof, amounts to an infringement of the copyright (*k*). Penalties are by statute (*l*) imposed for such infringements; but none the less an injunction may be obtained to restrain an intended infringer (*m*). The conditions under which a musical work is protected under the Act are discussed in the case cited below (*n*). Perforated rolls by means of which music may be mechanically produced have been held to be not an infringement, not being copies of a music sheet (*o*).

3 & 4 Will. IV. c. 15.
5 & 6 Vict. c. 45.
45 & 46 Vict. c. 40.

Copyright in prints, &c.

(4.) Copyright in prints, engravings and etchings depends on the statutes 8 Geo. II. c. 13, 7 Geo. III. c. 38, and 17 Geo. III. c. 57. The protection has been extended to sculpture by 54 Geo. III. c. 56; to lithographs by 15 & 16 Vict. c. 12, s. 14, and to original paintings, drawings and photographs by 25 & 26 Vict. c. 28 (*p*). Every copy of such works which comes so near to the original as to give the same idea created by the original is an infringement (*q*), and this includes any copy made by photography or other chemical process (*r*). But *tableaux vivants* repre-

(*i*) See *Reichardt* v. *Sapte*, (1893) 2 Q. B. 308.

(*k*) *Reade* v. *Lacy*, 1 J. & H. 524; *Chatterton* v. *Cave*, 3 App. C. 483; 2 C. P. D. 42. See *Chappell* v. *Boosey*, 21 Ch. D. 232; 51 L. J. Ch. 625.

(*l*) 3 & 4 Will. IV. c. 15.

(*m*) *Russell* v. *Smith*, 15 Sim. 181.

(*n*) *Fuller* v. *Blackpool, &c. Co.*, (1895) 2 Q. B. 429; 64 L. J. Q. B. 699.

(*o*) *Boosey* v. *Whight*, (1900) 1 Ch. 122; 69 L. J. Ch. 66.

(*p*) See *Nottage* v. *Jackson*, 11 Q. B. D. 627; 52 L. J. Q. B. 760.

(*q*) *West* v. *Francis*, 5 B. & Ald. 743; *Moore* v. *Clark*, 9 M. & W. 692.

(*r*) *Gambart* v. *Bull*, 14 C. B. N. S. 306; *Graves* v. *Ashford*, L. R. 2 C. P. 410. See *Melville* v. *Mirror of Life Co.*, (1895) 2 Ch. 531; 65 L. J. Ch. 41.

senting pictures do not constitute an infringement (*s*); nor do illustrations of such *tableaux vivants* (*t*); but if the *tableaux vivants* are presented with painted backgrounds copying the pictures, this has been deemed an infringement (*u*).

Copyright in designs for ornament,

(5.) Copyright in designs for ornament is regulated by 5 & 6 Vict. c. 100, 6 & 7 Vict. c. 65, 13 & 14 Vict. c. 104, 21 & 22 Vict. c. 70, and 24 & 25 Vict. c. 73; the duration of the protection differing according to the articles protected (*x*). A design within these statutes need not necessarily be a new invention; a combination of old materials may be protected if the design be new (*y*).

and designs for utility.

Designs for utility are protected by 6 & 7 Vict. c. 65, 13 & 14 Vict. c. 104, and 46 & 47 Vict. c. 57, and have reference to the shape or configuration of an article as conducive to its utility. The statutes do not apply to a combination of old designs, or to inventions or new applications, however useful; except in so far as the shape and configuration confer utility upon the invention (*z*). It suffices if the application of the design be novel, though the subject-matter is not (*a*).

The foregoing very general descriptions must here suffice to indicate the nature of the various species of copyright. For further details, and in particular as to the question of international copyright (*b*), reference should be made to works specially devoted to the subject.

Action, when maintainable.

Registration.

(6.) The proprietor of a copyright cannot, generally speaking, maintain an action in respect of the infringement of his right, until his copyright has been registered (*c*);

(*s*) *Hanfstaengl* v. *Empire Palace*, (1894) 2 Ch. 1; 63 L. J. Ch. 417; (1895) A. C. 20; 64 L. J. Ch. 81.

(*t*) *Hanfstaengl* v. *Newnes*, (1894) 3 Ch. 109; 63 L. J. Ch. 681.

(*u*) *Ibid.*

(*x*) See *Grave's Case*, L. R. 4 Q. B. 715.

(*y*) *Holdsworth* v. *Macrae*, L. R. 2 H. L. 380.

(*z*) *Rogers* v. *Driver*, 16 Q. B. 102; *Harper* v. *Wright*, (1896) 1 Ch. 142; 65 L. J. Ch. 161; *Re Clarke's Design*, (1896) 2 Ch. 38; 65 L. J. Ch. 629; *Heath* v. *Rollason*, (1898) A. C. 499; 67 L. J. Ch. 565.

(*a*) *Saunders* v. *Wiel*, (1893) 1 Q. B. 470; 62 L. J. Q. B. 341.

(*b*) See now 49 & 50 Vict. c. 33.

(*c*) See 5 & 6 Vict. c. 45, s. 24, and the various other statutes referred to. *Walter* v. *Howe*, 17 Ch. D. 708; 50 L. J. Ch. 621.

and he can obtain no injunction until the defendant's work has been published (*d*). It is not, however, necessary that he should show a clear legal title. A fair *primâ facie* title, or a clear colour of title, legal or equitable, is sufficient, even though limited in point of time or extent (*e*).

Primâ facie title sufficient.

Plaintiff must be diligent.

Delay or acquiescence, unless adequately explained, will be fatal to the claim (*f*), as will also participation in the conduct complained of (*g*). Under 5 & 6 Vict. c. 45, s. 26, all actions must be commenced within twelve months of the offence.

Nature of the injunction.

The injunction may be granted against the whole or a part of the work, according to the extent of the piracy (*h*); the whole will be included if the pirated part is so intermixed with the original matter as to be practically inseparable (*i*). In copyright, as in patent cases, an interlocutory injunction if granted usually determines the action. The plaintiff is, however, entitled to a perpetual injunction, and this will be decreed with costs at the hearing, unless the defendant has submitted to the interlocutory injunction, and offered to pay the costs up to that time (*k*).

Discovery.

Whatever relief is required by the plaintiff, as incident to the right to an injunction, may be decreed to him. Thus, he may have discovery of the original sources from which the defendant alleges that he has taken his work (*l*).

Account.

A right to an account of profits is also incident to the injunction (*m*). By statute the plaintiff is also entitled to delivery up of all copies of the defendant's work (*n*).

(*d*) *Morris* v. *Wright*, 5 Ch. 279.

(*e*) *Univ. of O. & C.* v. *Richardson*, 6 Ves. 689; *Nichol* v. *Stockdale*, 3 Swanst. 687.

(*f*) *Mawman* v. *Tegg*, 2 Russ. 393.

(*g*) *Rundell* v. *Murray*, Jac. 311.

(*h*) *Lewis* v. *Fullarton*, 2 Beav. 6.

(*i*) *Mawman* v. *Tegg*, *sup.*; *Kelly* v. *Morris*, 1 Eq. 697.

(*k*) *Millington* v. *Fox*, 3 My. & Cr. 352.

(*l*) *Kelly* v. *Wyman*, 17 W. R. 399.

(*m*) *Baily* v. *Taylor*, 1 R. & M. 73; *Colburn* v. *Simms*, 2 Ha. 560; *Procter* v. *Bayley*, 42 Ch. D. 390; 59 L. J. Ch. 12.

(*n*) 5 & 6 Vict. c. 45, s. 23; *Macrae* v. *Holdsworth*, 2 De G. & S. 497; *Muddock* v. *Blackwood*, (1898) 1 Ch. 58; 67 L. J. Ch. 6.

In deciding the question of piracy, the Court now usually inspects the work itself (*o*).

3. Trade marks and Trade names.

A third species of right, for the protection of which the remedy of injunction is peculiarly suitable, is that to the exclusive use of a trade mark. Apart from the provisions of the recent statutes which now regulate the law as to trade marks, the following principles were established for the protection of vendors and the public.

General principles of trade marks.

(1.) No man has a right to sell his goods as being the goods of another manufacturer or trader. If, therefore, some particular mark or symbol has come to be recognised in trade as the mark of the goods of a particular person, another person cannot lawfully mark his goods with that mark so as to induce a purchaser to believe that they are the goods of the person entitled to use the mark (*p*). The right is limited to the use of the mark in connexion with a particular class of goods; that is to say, it would be no infringement to mark goods of a different class with the same symbol (*q*). Moreover, if an article has acquired a certain name in the market, which name indicates its nature rather than its being of a particular manufacture, any man may call it by that name, though in the first place it may have been the name of the inventor or original maker (*r*).

What may be a trade mark.

(2.) Any name, symbol, or emblem which is not merely descriptive of an article, or which does not denote the general character of a business, may constitute a trade

(*o*) *Lewis* v. *Fullarton*, *sup.*

(*p*) *Perry* v. *Truefitt*, 6 Beav. 66; *Reddaway* v. *Banham*, (1896) A. C. 199; 65 L. J. Q. B. 381; *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893; 66 L. J. Ch. 533; *Birmingham, &c. Co.* v. *Powell*, (1897) A. C. 710; 66 L. J. Ch. 763; distinguish *Parsons* v. *Gillespie*, (1898) A. C. 239; 67 L. J. P. C. 21.

(*q*) *Edelsten* v. *E.*, 1 De G. J. & S. 185; *Hart* v. *Colley*, 44 Ch. D. 193; 59 L. J. Ch. 355.

(*r*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Bury* v. *Bedford*, *ib.* 352; *National Starch, &c. Co.* v. *Munn's &c. Co.*, (1894) A. C. 275; 63 L. J. P. C. 112; *Cellular Clothing Co.* v. *Maxton*, (1899) A. C. 326; 68 L. J. P. C. 72.

mark (*s*). No person other than the original inventor, or those claiming through him, may use such words as "the original" or "the only genuine" as a trade mark (*t*); but a man cannot be prevented from calling goods by his own name merely because some one of the same name invented the goods or made them before him (*u*). The same principle applies in the case of a partnership name, if the use of the name be *bonâ fide;* but the Court will not suffer a name to be used for the purpose of having the benefit of the reputation which another firm has acquired. This amounts to a fraud on the public (*x*). The cases referred to illustrate the application of the principles in question, and it will be observed that the distinctions drawn are sometimes necessarily fine.

Registration. 46 & 47 Vict. c. 57. 51 & 52 Vict. c. 50.

(3.) By the Patents, Designs and Trade Marks Act, 1883 (*y*), which repealed and amended the previous Registration Acts (*z*), and has itself been subsequently amended (*a*), registration of a trade mark is required before proceedings to prevent its infringement can be instituted. But trade marks in use prior to the 13th of August, 1875 (the date of the first Registration Act), are excepted. A trade mark must consist of or contain at least one of the following particulars:—(1.) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner. (2.) A written signature or copy thereof. (3.) A distinctive device, mark, brand, heading, label, ticket. (4.) An invented word or words; or (5) a word or words having no reference to

(*s*) *Braham* v. *Bustard*, 1 H. & M. 447; *Burgess* v. *B.*, 3 De G. M. & G. 896; *Raggett* v. *Findlater*, 17 Eq. 29.

(*t*) *Cocks* v. *Chandler*, 11 Eq. 449; *James* v. *J.*, 13 Eq. 425.

(*u*) *Burgess* v. *B.*, *sup.*; *Turton* v. *T.*, 42 Ch. D. 128; 58 L. J. Ch. 677; *Saunders* v. *Sun Life, &c. Co.*, (1894) 1 Ch. 537; 63 L. J. Ch. 247.

(*x*) *Croft* v. *Day*, 7 Beav. 84; *Singer, &c.* v. *Wilson*, 2 Ch. D 453; *Massam* v. *Thorley's, &c. Co.*, 14 Ch. D. 748; *Pinet* v. *P.*, (1898) 1 Ch. 179; 67 L. J. Ch. 41; *North Cheshire, &c. Brewery* v. *Manchester Brewery*, (1899) A. C. 83; 68 L. J. Ch. 74; *Cash* v. *C.* (1901), W. N. 46; *Panhard et Levassor* v. *Panhard*, (1901) 2 Ch. 513.

(*y*) 46 & 47 Vict. c. 57.

(*z*) 38 & 39 Vict. c. 91; 39 & 40 Vict. c. 33.

(*a*) 51 & 52 Vict. c. 50.

the character or quality of the goods and not being a geographical name (*b*). The cases cited illustrate the recent judicial interpretation of these requirements, which it would be beyond the scope of this work to consider in detail. The comptroller has a discretion as to the acceptance of a proposed mark, which is not readily interfered with, especially in the case of a mark more or less closely resembling one already registered for the same class of goods (*c*).

What amounts to imitation.

(4.) As to what amounts to colourable imitation or infringement, reference may be made to *Leather Cloth Co.* v. *American Cloth Co.* (*d*), *Seixo* v. *Provizende* (*e*), and other cases cited below (*f*). Almost all that can be laid down respecting this question in general terms is that the resemblance must be such as to deceive an ordinary purchaser; it is sufficient if it be calculated to deceive even the unwary; and it is not incumbent on the plaintiff to show that any one has been actually deceived (*g*). On the other hand, it has been held that the fact of one person having been actually deceived is not conclusive proof of an improper imitation (*h*). Each case must be judged on its own merits. Under the present statute, an innocent user of a protected mark amounts to an infringement (*i*).

Remedies.

(5.) Incident to the remedy of injunction in cases of infringement is the right to an account of the profits made

(*b*) See *Wood* v. *Lambert*, 32 Ch. D. 247; 55 L. J. Ch. 377; *Re Price's Pat. Candle Co.*, 27 Ch. D. 681; 54 L. J. Ch. 210; *Re Meyerstein's Trade Mark*, 43 Ch. D. 604; 59 L. J. Ch. 401; *Re Holt's Trade Mark*, (1896) 1 Ch. 711; 65 L. J. Ch. 410; *Re Bovril Trade Mark*, (1896) 2 Ch. 600; 65 L. J. Ch. 715; *Re Magnolia, &c. Trade Marks*, (1897) 2 Ch. 371; 66 L. J. Ch. 598; *Re Linotype Trade Mark*, (1900) 2 Ch. 238; 69 L. J. Ch. 625; *Rowland* v. *Mitchell*, (1897) 1 Ch. 71; 66 L. J. Ch. 110; *Re Faulder's Trade Mark*, (1902) 1 Ch. 125; *Re Uneeda Trade Mark*, (1902) 1 Ch. 783.

(*c*) *Eno* v. *Dunn*, 15 App. C. 252; *Re Goodall's Trade Mark*, 42 Ch. D. 566.

(*d*) 11 H. L. 523.

(*e*) 1 Ch. 192.

(*f*) *Montgomery* v. *Thompson*, (1891) A. C. 217; 60 L. J. Ch. 757; *Reddaway* v. *Bentham, &c. Co.*, (1892) 2 Q. B. 639.

(*g*) *Johnston* v. *Orr-Ewing*, 7 App. C. 219; 51 L. J. Ch. 797.

(*h*) *Civil Service Supply Ass.* v. *Dean*, 13 Ch. D. 512.

(*i*) *Upmann* v. *Forester*, 24 Ch. D. 231; 52 L. J. Ch. 946.

by the illegal user (*k*). An innocent vendor of goods spuriously marked is, however, not liable to an account, except in respect of sales made after he has acquired knowledge of the wrong (*l*). A plaintiff must, in these as in other cases, be prompt in his application after discovery of the infringement. Delay or acquiescence may be held to bar his right to an injunction (*m*).

4. **Goodwill.**

Goodwill.

The remedy of injunction has often been sought for the protection of rights arising from the sale or assignment of the goodwill of a business. It is now decided after some conflict of opinion that, in the absence of an express agreement to the contrary, a vendor of a business is entitled to set up a business of a similar nature; but that, having sold the goodwill, he may be restrained from soliciting the customers of the former firm (*n*). The purchaser may use the vendor's name so far as is necessary to show the continuation of the business, provided that it is so done as not to involve the vendor in any liability, or to practise any deception on the public (*o*). But if the vendor bargains expressly not to interfere with the customers, or otherwise binds himself by contract not to carry on business so as to interfere with the purchaser, his negative contract may be enforced by injunction (*p*). Such contracts must conform to the rules of law respecting contracts in restraint of trade, or they will be void, as opposed to public policy (*q*). A full discussion of the scope of these rules may be found

(*k*) *Burgess* v. *Hills*, 26 Beav. 244. See also *General Accident Corp.* v. *Noel*, (1902) 1 K. B. 377.

(*l*) *Moet* v. *Couston*, 33 Beav. 578.

(*m*) *Motley* v. *Downman*, 3 My. & Cr. 1; *Lee* v. *Haley*, 5 Ch. 155, 160.

(*n*) *Trego* v. *Hunt*, (1896) A. C. 7; 65 L. J. Ch. 1; overruling *Pearson* v. *P.*, 27 Ch. D. 145; 54 L. J. Ch. 32; and approving *Labouchere* v. *Dawson*, 13 Eq. 322; *Vernon* v. *Hallam*, 34 Ch. D. 748; 56 L. J. Ch. 115.

(*o*) *Thorneloe* v. *Hill*, (1894) 1 Ch. 569; 63 L. J. Ch. 331; *Thynne* v. *Shove*, 45 Ch. D. 577; 59 L. J. Ch. 507.

(*p*) *Whittaker* v. *Howe*, 3 Beav. 683; *Baines* v. *Geary*, 35 Ch. D. 154; 56 L. J. Ch. 935.

(*q*) *Homer* v. *Ashford*, 3 Bing. 322.

in the notes to *Mitchel* v. *Reynolds*, in Smith's Leading Cases (*r*), to which reference should be made.

Trade secrets.

The Court has also jurisdiction to restrain the inequitable disclosure of trade secrets, the knowledge of which has been acquired in the course of confidential employment (*s*). The cases cited illustrate the application of this principle to the attempted use of engineering drawings and of a list of the plaintiff's customers. It is an implied term of the contract of service that there shall be no such breach of confidence (*t*).

(*r*) 1 Sm. L. C. 417.

(*s*) *Merryweather* v. *Moore*, (1892) 2 Ch. 518; 61 L. J. Ch. 505; *Robb* v. *Green*, (1895) 2 Q. B. 315; 64 L. J. Q. B. 593.

(*t*) *Lamb* v. *Evans*, (1893) 1 Ch. 218; 62 L. J. Ch. 404; *Louis* v. *Smellie* (1895), W. N. 115.

CHAPTER VIII.

Instances of Jurisdiction analogous to Injunction.

I. *Cancellation and Delivery up of Documents.*
II. *Actions to establish Wills.*
III. *Actions* Quia Timet.
IV. *Actions in the nature of Bills of Peace.*
V. *Writ of* Ne Exeat Regno.
VI. *Actions to perpetuate Testimony.*

I. *Cancellation and Delivery up of Documents.*

Grounds of the jurisdiction.

Courts of equity have long been wont to entertain suits which seek the cancellation, rescission, or delivery up of instruments, when there is a danger of their being improperly employed for the injury of the plaintiff. Such cases are now, by the Judicature Act, assigned to the Chancery Division (*a*).

It often happens that agreements, securities, or deeds which have answered the purposes for which they were created, or which are voidable or even entirely void, have nevertheless an appearance of validity, and may therefore be used by an ill-disposed person for purposes of annoyance, vexation, and fraud. In such circumstances, no preventive remedy could be obtained at law, and a useful field was accordingly left for the peculiar jurisdiction of equity (*b*).

Remedy discretionary.

It is apparent that the relief sought in such cases bears some resemblance to that of Injunction; and as in that case, so in this, the exercise of the jurisdiction is eminently

(*a*) 36 & 37 Vict. c. 66, s. 34 (3).
(*b*) Story, 692.

a matter within the discretion of the Court. A decree cannot be demanded as a matter of right; the Court will consider all the circumstances of the case, and impose such conditions as it thinks fit (*c*). It remains to consider in what cases, and under what circumstances, equity will grant the relief desired.

When granted.

There are three classes of instruments to be particularly considered: First, those which are utterly void; secondly, those which are voidable; thirdly, those which are in themselves unexceptionable, but to which the plaintiff has a title as against the defendant.

1. Void instruments.

1. As to void instruments, it was at one time questioned whether Courts of equity ought to interfere to procure their cancellation or delivery up. It was argued against the jurisdiction, that such instruments being of no effect at law, there was no necessity for any equitable interference respecting them; and further, that if an equitable remedy was needed, the proper course would be the issuing of a perpetual injunction against the use of the instrument (*d*).

Relief granted unless illegality is apparent on their face.

On the other hand, more recent cases have proceeded on the principle that if there is a real danger that such an instrument may be injuriously used, that alone supplies sufficient ground for equitable interference (*e*).

The question whether the Court would or would not interfere, therefore, resolved itself into the question whether the instrument was of such a nature as to admit of injurious use. If so, it would be ordered to be delivered up; if not, equity would not interpose.

Not if it is so.

If, then, the illegality of the instrument, whether agreement, security, or deed, is apparent on the face of it, so that its nullity can admit of no doubt, there is no sufficient ground for seeking equitable assistance respecting it.

(*c*) Story, 693; *Goring* v. *Nash*, 3 Atk. 188.

(*d*) Story, 698; *Hilton* v. *Barrow*, 1 Ves. jr. 284; *Ryan* v. *Mackmath*, 3 Bro. C. C. 15, 16.

(*e*) Swanston's note to *Davis* v. *D. of Marlborough*, 2 Swanst. 157; *Jones* v. *Merioneth P. B. Building Soc.*, (1892) 1 Ch. 173; 61 L. J. Ch. 138.

Such a document is plainly innocuous; no lapse of time can add to its power so as to render it dangerous. Illustrations are supplied by instruments which on their face disclose an illegal consideration, or the fact that they have been fully satisfied (*f*). Equity, which will do nothing which is useless, will not interfere in such cases.

Where, however, an instrument, though in fact void, has an appearance of validity, the case is otherwise. Then there exists a material danger against which protection may reasonably be sought. Thus, a deed purporting to convey hereditaments, as long as it remains in hostile hands, has a tendency to throw a cloud on the title (*g*); a mere written agreement may be used vexatiously and improperly (*h*); and in such cases lapse of time only adds to the danger, by rendering it more difficult to procure the evidence necessary to expose the fraud (*i*). In such cases if the Court considers it against conscience for a party to hold or retain the mischievous document, its jurisdiction to order delivery up and cancellation is well established; or it may, in a proper case, perpetuate the testimony necessary for a legal defence (*k*). Forged instruments have similarly been held to be delivered up, without any prior trial at law as to the forgery (*l*).

Cases in which equity has granted relief.

Voidable instruments.

2. As to voidable instruments, it is not now necessary to repeat what has already been said under the headings of Fraud and Mistake respecting the circumstances which will give a person the option of avoiding his own acts. The present question has a close connexion with what

(*f*) *Simpson* v. *Howden*, 3 My. & Cr. 97; *Smyth* v. *Griffin*, 13 Sim. 245; *Threlfall* v. *Lunt*, 7 Sim. 627.

(*g*) *Pierce* v. *Webb*, 3 Bro. C. C. 16; *Byne* v. *Vivian*, 5 Ves. 607; *Bond* v. *Walford*, 32 Ch. D. 238; *Phillips* v. *Probyn*, (1899) 1 Ch. 811; 68 L. J. Ch. 401.

(*h*) *Bromley* v. *Holland*, 7 Ves. 20.

(*i*) *Kemp* v. *Prior*, 7 Ves. 248.

(*k*) *Inf.*, p. 817; *Brooking* v. *Maudslay*, 38 Ch. D. 636; 57 L. J. Ch. 1001.

(*l*) *Peake* v. *Highfield*, 1 Russ. 559; *Johnston* v. *Renton*, 9 Eq. 181; *Cooper* v. *Vesey*, 20 Ch. D. 612; 51 L. J. Ch. 862.

was there stated, and referring thereto, it may be briefly answered—

Equity will set aside and cancel a voidable agreement or security :—

(1.) When the defendant has been guilty of actual fraud, in which the plaintiff has not participated.

Cancelled on ground of fraud in defendant.

This is the simplest and clearest case, plainly conformable to the elementary rule that a man shall not be allowed to reap an advantage from his own fraud against one who is innocent.

(2.) Where the plaintiff, as well as the defendant, has in some degree participated in the fraud, but they are not *in pari delicto*.

Plaintiff must be innocent, or not *in pari delicto*.

It is a general maxim that "*he who comes into equity must come with clean hands*"; and as a rule no relief will be given to one who has been guilty of any unconscientious dealing respecting the subject-matter of the suit. But if a fraud has been committed by the defendant, and participated in by the plaintiff, yet if the plaintiff acted under the influence of oppression, imposition, hardship, or other undue influence, such as may arise from great inequality between the ages and conditions of the parties, he may succeed in establishing his claim to relief (*m*).

(3.) If the transaction has been in effect a fraud upon public policy.

Relief on grounds of public policy. Even though plaintiff has participated.

In these cases, as in those last mentioned, relief may be given notwithstanding the participation of the plaintiff in the fraud; the reason in this case is that public policy would be defeated by allowing the transaction to stand. Thus, gaming securities have on this ground been decreed to be given up (*n*), and other agreements founded on immoral considerations cancelled (*o*).

Save, however, in these two exceptional cases, equity will

(*m*) *Osborne* v. *Williams*, 18 Ves. 379; *Bosanquet* v. *Dashwood*, Ca. t. Talb. 37, 40, 41.

(*n*) *Milltown* v. *Stewart*, 3 My. & Cr. 18.

(*o*) *W.* v. *B.*, 32 Beav. 574.

peremptorily refuse its assistance to one who has himself been guilty of fraud, whether actual or constructive (*p*).

Valid instruments.

3. Lastly, we have to consider those cases in which the plaintiff seeks the delivery up of an instrument not on the ground of any equity arising out of the nature of the instrument itself, but because he has an equitable right as against the defendant to its possession or custody. In these cases there is of course no question as to cancellation; the relief sought is simply delivery up.

Relief on ground of title.

A person is entitled to the title deeds of his own property; thus, heirs-at-law, devisees, and other persons properly entitled to the custody and possession of the title deeds of their property may come into equity and obtain a decree for the specific delivery of them (*q*); and the same doctrine applies to other instruments, such as bonds, negotiable instruments, &c., which are detained from persons who have a legal or equitable interest in them (*r*).

In such cases the Courts of common law could not afford complete redress, since the prescribed forms of their remedies rarely enabled them to pronounce a judgment *in rem*.

Preservation of deeds.

Similarly, remaindermen and reversioners, and other persons having limited or ulterior interests in real estate, may in many cases take measures in equity to secure the preservation of their title deeds (*s*). The plaintiff must, however, in such cases be prepared to show the necessity for his action by proving that there is some danger of the loss or destruction of the instruments unless protected by the Court, and his interest must not be too remote (*t*).

(*p*) *Franco* v. *Bolton*, 3 Ves. 386; *St. John* v. *St. J.*, 11 *ib.* 535; *Ayerst* v. *Jenkins*, 16 Eq. 275; distinguished in *Phillips* v. *Probyn*, (1899) 1 Ch. 811.

(*q*) *Reeves* v. *R.*, 9 Mod. 128; *Tanner* v. *Wise*, 3 P. Wms. 296; *Cooper* v. *Vesey*, 20 Ch. D. 612; 51 L. J. Ch. 862; *Manners* v. *Mew*, 29 Ch. D. 725; 54 L. J. Ch. 909.

(*r*) *Kaye* v. *Moore*, 1 S. & S. 61; *Freeman* v. *Fairlie*, 3 Mer. 30.

(*s*) *Smith* v. *Cooke*, 3 Atk. 382; and see *Jenner* v. *Morris*, 1 Ch. 603; *Stanford* v. *Roberts*, 6 Ch. 307; *Lyell* v. *Kennedy*, 8 App. C. 217.

(*t*) *Ivie* v. *I.*, 1 Atk. 431; *Ford* v. *Peering*, 1 Ves. jr. 76.

It may be here observed that voluntary agreements untainted with fraud, although not enforceable in equity, will not be set aside. Unless such a deed reserves a power of revocation, the settlor will be bound thereby (*u*), and the fact that such a deed contains no power of revocation is not sufficient to render it voidable (*x*).

Voluntary settlements not relieved against.

II. *Actions to establish Wills.*

In considering the equitable jurisdiction to establish wills, the student must carefully observe two things: first, the distinction which formerly existed between the juristic effects of wills of personalty and wills of realty; secondly, the distinction between disputes as to the validity and disputes as to the construction of wills.

1. A will of personal property requires for its effectual performance the appointment of a legal personal representative. Usually the will itself provides for this by the appointment of one or more executors. If not, or if those appointed are incapable, the Court supplies the vacancy by the appointment of an administrator. If the will is in other respects valid, the administrator *cum testamento annexo* acts in conformity therewith as an executor. The *persona* of the testator devolves in a measure upon him; he is liable for the debts; the general personalty vests in him, and only passes to the beneficiaries by his consent.

Will of personalty requires legal personal representative,

in whom the property vests.

A will of real property, on the other hand, operated in effect as a conveyance. Putting aside for the present the various steps by which it became liable to debts, and in some respects placed within the power of the executors, the

Will of real property a conveyance to the devisee.

(*u*) *Villiers* v. *Beaumont*, 1 Vern. 101; *Bill* v. *Cureton*, 2 My. & K. 503.

(*x*) *Hall* v. *H.*, 8 Ch. 430; *Henry* v. *Armstrong*, 18 Ch. D. 668. See *Bonhote* v. *Henderson*, (1895) 2 Ch. 202; 64 L. J. Ch. 556.

will itself might be regarded as an assignment of the real estate to the devisee or devisees named. Now, however, by the Land Transfer Act, 1897 (*y*), real estate as well as personalty vests on the testator's death in his personal representatives, who hold the same as trustees for the persons beneficially entitled; and probate and letters of administration may be granted of a will comprising real estate only.

Distinction between disputes as to validity and as to construction.

2. The second distinction needs only to be stated. It is evident that the question whether a certain document is or is not a will is quite distinct from the question as to what its language means.

When we speak of the jurisdiction of Courts of equity over wills, we refer to the former of these questions. The construction of wills is a matter in which they are continually concerned, and which has already come largely under our consideration in connexion with the administration of assets.

No general jurisdiction in Chancery as to validity of wills;

Previous to the Judicature Acts the Court of Chancery had no general jurisdiction as to the validity of wills. As regards wills of personal property, the Court of Probate, which by virtue of 20 & 21 Vict. c. 77, succeeded in 1857 to the functions of the Ecclesiastical Court, was the proper forum; and the same Court at the same time acquired jurisdiction as to wills of real property, which was formerly exercised by the Courts of Common Pleas and Queen's Bench.

not even in cases of fraud.

The position of the Court of Chancery with respect to wills is well illustrated by the case of *Allen* v. *M'Pherson* (*z*), in which it was sought to set aside a will of personalty by suit in equity on the ground of undue influence, notwithstanding that it had been admitted to probate in the Ecclesiastical Court; but the bill was dismissed for want of jurisdiction. A similar decision has been much more recently arrived at in a case in which both real and per-

(*y*) 60 & 61 Vict. c. 65, ss. 1 and 2. (*z*) 1 H. L. 191.

sonal property were concerned (*a*). It has indeed been held under the Judicature Acts that the Chancery Division has now concurrent jurisdiction with the Probate Division to grant probate of wills (*b*); but the same cases show that it is most unlikely to put this power into exercise.

But, notwithstanding these considerations, and previous to the Judicature Acts, the cases were numerous in which a qualified jurisdiction respecting wills was exercised by Courts of equity.

Incidental jurisdiction before Jud. Acts.

In the first place, if a will came incidentally before the Court, and its validity had not been admitted or elsewhere established, the Court effectually determined the question. This was done either by directing an issue to be tried at law, or by the production and examination of witnesses in the Court of equity itself; and when the validity of the will was thus once determined, the rights of those claiming under it might be established, if necessary, by a perpetual injunction against the heir (*c*).

Wills of pure real estate established in equity.

Secondly, as regards wills purely of real estate, which formerly required neither the appointment of an executor nor a grant of probate, equity had jurisdiction to entertain a suit by a devisee to establish his right against the heir, by means of a perpetual injunction restraining him from contesting its validity in future (*d*). Such action could not have been brought at law, and yet might be necessary for the security of the devisee; since the heir might delay seeking ejectment against him until the evidence was grown obscure. The jurisdiction, therefore, is in some respects analogous to that which empowers interference *quia timet* (*e*).

Boyse v. *Rossborough*.

A leading authority respecting actions of this nature is *Boyse* v. *Rossborough* (*f*), where a will was established

(*a*) *Meluish* v. *Milton*, 3 Ch. D. 27.

(*b*) *Pinney* v. *Hunt*, 6 Ch. D. 101; *Bradford* v. *Young*, 26 *ib.* 656; and see *Priestman* v. *Thomas*, 9 P. D. 70, 210.

(*c*) *Sheffield* v. *D. of Buckinghamshire*, 1 Atk. 628.

(*d*) *Bootle* v. *Blundell*, 19 Ves. 494, 509.

(*e*) *Infra*, p. 810.

(*f*) Kay, 71; 1 K. & J. 124; 3 De G. M. & G. 817; 6 H. L. 1.

at the suit of a devisee against an heir, although the heir had brought no ejectment against the devisee, although no trusts were declared by the will, and although there was no necessity for the administration of the estate by the Court. It has also been held that the Court has power to establish such a will not only against the heir, but against all persons setting up adverse claims—for instance, claims depending on a prior will (*g*).

Heir cannot sue to contest a will.

On the other hand, an heir, having a complete legal remedy by action of ejectment, could not have come into equity as plaintiff to contest the validity of a will, except, at least, by consent of the devisee. Under the present practice, these distinctions between the jurisdiction of Courts of law and equity have, of course, ceased to exist.

The combined result of legislation and decision, therefore, even previous to the Land Transfer Act, 1897, already referred to (*h*), practically confined the jurisdiction to establish wills to a very limited number of cases—namely, to wills relating solely to real property. Since the last-mentioned Act has placed wills of real estate on the same footing (as regards Probate) as wills of personalty, it would appear the jurisdiction now under consideration has become practically obsolete (*i*).

III. *Actions* Quia Timet.

In certain circumstances equity has jurisdiction to interfere for the protection of a right before any injury has been actually done, and a party who fears a probable invasion of his right may establish an action for his protection without claiming any other relief.

(*g*) Kay, 71; 1 K. & J. 124; 3 De G. M. & G. 117; 6 H. L. 1; *Lovett* v. *L.*, 3 K. & J. 1.

(*h*) *Sup.* p. 808.

(*i*) See *Plomley* v. *Stileman* (1901), W. N. 165.

Nature of relief given *quia timet*.

The nature of the relief given depends, of course, upon the circumstances under which it is sought; sometimes it takes the form of the appointment of a receiver of rents or other income; sometimes that of an order to pay a fund into Court; sometimes security is directed to be given; sometimes it suffices merely to issue an injunction (*k*).

The object of the action in all cases is to preserve property to its appropriate uses and ends. It must here suffice to adduce a few illustrations of the circumstances which call for and warrant the exercise of the jurisdiction.

Preservation of trust property.

1. If property in the hands of a trustee is in danger of being diverted or squandered, to the injury of any claimant having a present or prospective title thereto, the Court will take such measures for its protection as it deems requisite. And the same principle applies to executors or administrators, if there is danger of collusion between them and the debtors of the estate, or of a waste of the estate from any other cause (*l*). Such cases will generally be met by the appointment of a receiver; and when this is done the appointment is made for the benefit of all the parties in interest, and not for that of the plaintiff only (*m*).

Appointment of receiver.

The appointment of a receiver rests in the discretion of the Court; and when appointed he is regarded as an officer of the Court, and therefore subject to its orders (*n*): he is required to give security.

Keeping down incumbrances.

2. Where the tenants of a particular estate for life or in tail neglect to keep down the interest due upon incumbrances, the Court often appoints a receiver to secure the performance of this duty (*o*).

Protection of sureties.

3. The jurisdiction is also exercised for the protection of sureties. A surety who apprehends loss from the delay of

(*k*) Story, 826; *Hendriks* v. *Montague*, 17 Ch. D. 638.

(*l*) Story, 827, 828; *Taylor* v. *Allen*, 2 Atk. 213; *Foxwell* v. *Van Grutten*, (1897) 1 Ch. 64; 66 L. J. Ch. 53; *John* v. *J.*, (1898) 2 Ch. 573; 67 L. J. Ch. 616.

(*m*) *Davis* v. *D. of Marlborough*, 1 Swanst. 83; 2 *ib.* 125.

(*n*) *Skip* v. *Harwood*, 3 Atk. 564.

(*o*) *Giffard* v. *Hart*, 1 S. & L. 407, n.

his creditor to sue the principal debtor may come into equity to compel the discharge of the debt (*p*).

Protection of future rights in personalty.

4. In all cases in which there is a future right of enjoyment of personal property, and there is danger of loss or deterioration or injury to it in the hands of the party entitled to present possession, equity has power to interpose, and grant relief on an action in the nature of a bill *quia timet* (*q*). Such cases may be met by an order to give security (*r*); or, still more effectually, by requiring the fund to be paid into Court (*s*). Whenever trust money is traced to hands not entitled to hold it, the Court will, on the application of the *cestuis que trusts*, order its payment into Court (*t*).

Security.

Payment into Court.

Injunctions.

It is, of course, unnecessary here to dwell upon the circumstances which warrant the granting of injunctions for the protection of property, these having been already copiously illustrated. In order to claim an injunction *quia timet* the plaintiff, as in the case of injunctions against legal wrongs generally, must show either that substantial danger is imminent, or that the threatened injury will, if it happens, be irreparable (*u*), or, at least, a strong case of probability that the apprehended mischief will in fact arise (*x*). We need only further observe that the same authority, above quoted, which now enables the Court to grant an injunction by an interlocutory order whenever it seems to be just or convenient, enables it to appoint a receiver in a similar manner and on similar conditions (*y*). This extensive power renders it now unnecessary to con-

Jud. Act, 1873, s. 25, sub-s. 8.

(*p*) *Wright* v. *Simpson*, 6 Ves. 734; and see *Wooldridge* v. *Norris*, 6 Eq. 410; *Hughes-Hallett* v. *Indian, &c. Co.*, 22 Ch. D. 561.

(*q*) Story, 845.

(*r*) *Rous* v. *Noble*, 2 Vern. 249.

(*s*) *Slanning* v. *Style*, 3 P. Wms. 336.

(*t*) *Leigh* v. *Macaulay*, 1 Y. & C. Ch. 260; *Bowsher* v. *Watkins*, 1 R. & M. 277.

(*u*) *Fletcher* v. *Bealey*, 28 Ch. D. 688; 54 L. J. Ch. 424; *Tussaud* v. *T.*, 44 Ch. D. 678; 59 L. J. Ch. 631; *Martin* v. *Price*, (1894) 1 Ch. 276; 63 L. J. Ch. 209.

(*x*) *Att.-Gen.* v. *Manchester Corp.*, (1893) 2 Ch. 87; 62 L. J. Ch. 459, and cases there cited.

(*y*) Jud. Act, 1873, s. 25, sub-s. 8.

sider many restrictions on the jurisdiction which were formerly effective.

IV. *Actions in the nature of Bills of Peace.*

In some respects analogous to the remedy last considered is that formerly known as a bill of peace, and now taking the form of an action of the same effect as the former bill.

Nature of bills of peace.

A bill of peace was one brought to establish and perpetuate a right which from its nature might be controverted by different persons at different times, and by different actions; or where separate attempts had already been made to overthrow the same right, and justice required that the party should be quieted in the right and relieved from the annoyance of continual litigation. In such cases equity, which is always opposed to multiplicity of suits, has jurisdiction to interfere and put an end to the fruitless litigation.

The right of one established against many defendants.

One class of cases in which this remedy is appropriate consists of those in which one general right is to be established against a great number of persons, as where a person has possession and claims a right of fishery on a river, and the riparian proprietors set up several adverse rights (*z*); or where a lord seeks to restrain encroachments by tenants under colour of a common right, or to establish an enclosure which he has approved under the Statute of Merton (*a*).

The right of many against one.

Similar relief may be sought where many persons claim or defend a right against one; as where tenants seek to prevent the disturbance by a lord of a common right (*b*).

(*z*) *M. of York* v. *Pilkington*, 1 Atk. 282; *Tenham* v. *Herbert*, 2 *ib.* 483.

(*a*) 20 Hen. III. c. 4; *Hanson* v. *Gardiner*, 7 Ves. 305; *D. of Norfolk* v. *Myers*, 4 Mad. 50, 117.

(*b*) *Conyers* v. *Abergavenny*, 1 Atk. 285; *Phillips* v. *Hudson*, 2 Ch. 243.

Conditions of the remedy.

But in order to entitle a party to claim the assistance of the Court on these grounds, it must be clear that there is a right claimed which affects many persons, and a suitable number of parties in interest must be brought before the Court (*c*); and it is to be observed that the Court will not decree a perpetual injunction in contradiction of a public right, such as a right to a highway or to a common navigable river (*d*). On the one hand, the right in question must affect numerous parties; on the other, it must not affect the public at large.

Protection of rights well established at law.

Another class of cases for which a bill of peace was an apt remedy, comprised those in which the plaintiff had after repeated trials established his legal right, but yet was threatened with further litigation from new attempts to controvert it. In such circumstances, the Court was wont to grant a perpetual injunction to quiet the plaintiff's possession, and to suppress future litigation (*e*). It would not, however, interfere until the right had been satisfactorily established at law; but two trials were deemed a sufficient determination of the right to warrant an injunction (*f*).

Rolt's Act.

By 25 & 26 Vict. c. 42, the Court of Chancery was empowered to direct an issue, if necessary, to be tried at the assizes or at *nisi prius*, or to itself decide the question of

Jud. Acts.

law or fact: and since the Judicature Acts the Courts of law could themselves apply the remedy without requiring the defendant to appear as a plaintiff in equity. We have already seen, that as regards the various divisions of the High Court of Justice no one division can now restrain proceedings in another. Each can order a stay of its own proceedings whenever there is an equitable claim to it.

(*c*) Story, 857; *Cowper* v. *Clerk*, 3 P. Wms. 15.

(*d*) Story, 858; *Hilton* v. *Scarborough*, 2 Eq. Ca. Ab. 171.

(*e*) *E. of Bath* v. *Sherwin*, Prec. Ch. 261; 10 Mod. 1; 4 Bro. P. C. 373.

(*f*) *Devonsher* v. *Newenham*, 2 S. & L. 208; *Leighton* v. *L.*, 1 P. Wms. 671.

V. *Ne Exeat Regno.*

Nature and origin of the writ.

The writ of *ne exeat regno* was a prerogative writ, issued to prevent a person from leaving the realm. It was originally applied only for political objects and purposes of state, and at present it is exercised for the protection of private rights with much caution and jealousy (*g*).

Granted only for equitable debts,

The writ *ne exeat regno* was, as a rule, only granted in respect of equitable debts, a plaintiff who had a legal claim being left to his legal remedy. But to this rule there were two exceptions.

except in cases of alimony,

First, when alimony had been decreed to a wife the writ was procurable to restrain the husband from evading the obligation by leaving the realm (*h*). The alimony must, however, have been actually decreed, and not appealed from. The writ could not be obtained while the case was still pending (*i*).

and where there is admitted balance but larger sum is claimed.

Secondly, where there was an admitted balance due from the defendant to plaintiff, but the plaintiff claimed a larger sum, he might be assisted by the writ (*k*). This case was brought within the purview of equity by its jurisdiction in matters of account.

Conditions of the remedy.

With respect to the equitable demands for which the writ might be issued, they were required to be certain as to their nature, and actually and presently payable, not contingent or prospective (*l*). It must also have been a pecuniary demand, and not of the nature of damages or any unliquidated claim (*m*). It need not, however, have been directly created between the parties; thus the *cestui que trust* or obligee of a bond was entitled to the writ against the obligor (*n*). A *cestui que trust* who has a

(*g*) Story, 1465-7.
(*h*) *Read* v. *R.*, 1 Ch. Ca. 115; *Shaftoe* v. *S.*, 7 Ves. 71.
(*i*) *Ibid.*; *Dawson* v. *D.*, 7 Ves. 173; *Colverson* v. *Bloomfield*, 29 Ch. D. 341; 54 L. J. Ch. 817.
(*k*) *Jones* v. *Samson*, 8 Ves. 593; *Jones* v. *Alephsin*, 16 Ves. 471.
(*l*) *Anon.*, 1 Atk. 521; *Rice* v. *Gaultier*, 3 *ib.* 500.
(*m*) *Etches* v. *Lance*, 7 Ves. 417; *Cock* v. *Ravie*, 6 *ib.* 283.
(*n*) *Grant* v. *G.*, 3 Russ. 598; *Leake* v. *L.*, 1 J. & W. 605.

vested interest is entitled to the writ as against his trustee, if he has reason to apprehend that he is going abroad (*o*); but the breach of trust must be brought home to the trustee before he is liable to the process (*p*).

Such were the general conditions of the jurisdiction as unaffected by legislation. At present it seems that its scope is completely determined by the following statutes:

Debtors Act, 1869.

(1.) By the Debtors Act, 1869 (*q*), which, with certain exceptions, abolished imprisonment for debt, it was enacted that in future no person should be arrested upon mesne process in any action, but that where the plaintiff in any action in any of the Courts of law at Westminster, in which previously the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath to the satisfaction of the judge that the plaintiff has good cause of action against the defendant to the amount of £50, and that there is probable cause for believing that the defendant is about to quit England, and that his absence will materially prejudice the plaintiff in his action, such judge may order the defendant to be arrested and imprisoned for a period not exceeding six months, unless he gives the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court.

Effect of the Act.

With respect to this enactment, it has been held that it has in effect confined the writ of *ne exeat regno* to cases which come within its provisions (*r*), the reasoning being that the jurisdiction of Chancery must follow that of law, and the power of the Courts of law to arrest for legal debts being by this statute restricted, the power of the Courts of equity with respect to equitable debts was subjected to a corresponding restriction. This argument does not seem to have been resorted to in *Sobey* v. *Sobey* (*s*), in

(*o*) *Hawkins* v. *H.*, 1 Dr. & Sm. 75.

(*p*) See *Re Owens*, 47 L. T. N. S. 61.

(*q*) 32 & 33 Vict. c. 62.

(*r*) *Drover* v. *Beyer*, 13 Ch. D. 242.

(*s*) 15 Eq. 200.

which the writ was issued in the same manner as before the statute (*t*).

Jud. Acts.

(2.) Further, by the Judicature Acts, the distinction between legal and equitable debts has disappeared, so that the reasoning applied by the Master of the Rolls in *Drover* v. *Beyer* is now much stronger than it would have previously been. It appears from this case, at any rate, that the effect of the Judicature Acts has not been to extend the remedy.

Bankruptcy Act, 1883.

(3.) It may here be further mentioned, that by the Bankruptcy Act, 1883 (*u*), power is conferred upon the Court of Bankruptcy to issue a similar writ, under the conditions there prescribed, to prevent a debtor from going abroad after the issue of a bankruptcy notice, or presentation of a bankruptcy petition against him.

VI. *Actions to perpetuate Testimony.*

Grounds of the jurisdiction.

Circumstances often arise in which public justice requires that measures should be taken to perpetuate evidence of a right which cannot be presently protected by judicial decision. For instance, a person may have a claim to a remainder, or he may be in actual possession of the property in question: in neither case can he directly make his right the subject of a judicial decision; and yet his right may be dependent upon evidence which the lapse of time will weaken or perhaps destroy. In such circumstances it is in the highest degree necessary for him that some measures should be taken to secure or perpetuate this evidence, and so to protect him against some adverse

(*t*) And see *Lees* v. *Patterson*, 7 Ch. D. 866.

(*u*) 46 & 47 Vict. c. 52, s. 25; *Hands* v. *Andrews*, (1893) 2 Ch. 1; 62 L. J. Ch. 336.

claimant, who may be purposely delaying his suit with a view to profit by the loss of the proofs of title.

Such cases strongly appealed to that principle of equity which declares that it will not suffer a wrong without a remedy. And yet the exercise of a jurisdiction thus to perpetuate testimony was evidently subject to the strong objection that the depositions so taken were not published until after the death of the witnesses. The evidence, therefore, was not given under the sanction of the legal penalties attached to perjury. In consequence of the danger thus attending the process, we find that the Courts of equity were careful only to grant relief of this kind in strong cases, where a failure of justice would be otherwise seriously threatened (*x*). Assistance was refused if by any means open to the plaintiff the whole matter could be at once adjudicated upon (*y*). If, as in the illustrations above given, this was impossible, equity would exercise the necessary jurisdiction, and take the requisite evidence (*z*).

Objections thereto,

and consequent caution in its exercise.

It is immaterial, as regards the exercise of the jurisdiction, whether the subject-matter in question is real or personal estate, or of the nature of a mere personal demand, or whether the evidence to be used tends to the proof of the plaintiff's title or is needed for defence (*a*). Equity, however, will do nothing in vain, and it accordingly will not interfere to support a right which is liable to be immediately barred; for instance, it will not entertain an action of this nature by a remainderman against a tenant in tail in possession, who can at any time bar the entail (*b*). Formerly, moreover, a mere expectancy, such as that of an heir-at-law, was not deemed sufficient to sustain a bill, though a remote or contingent interest would do so (*b*). But 5 & 6 Vict. c. 69, provided for this case, and extended the remedy by enacting that any person who would under

Applicable to any kind of property.

Expectancies.

5 & 6 Vict. c. 69.

(*x*) *Angell* v. *A.*, 1 S. & S. 83.
(*y*) *Ellice* v. *Roupell*, 32 Beav. 299.
(*z*) *Spencer* v. *Peek*, 3 Eq. 415; *Re Tayleur*, 6 Ch. 416.
(*a*) Story, 1509; *Suffolk* v. *Green*, 1 Atk. 450; *Brooking* v. *Maudslay*, 38 Ch. D. 636; 57 L. J. Ch. 1001.
(*b*) *Dursley* v. *Fitzhardinge*, 6 Ves. 261.

the circumstances alleged by him to exist become entitled upon the happening of any future event to any honour, title, dignity or office, or to any estate or interest in any property, real or personal, the right or claim to which could not by him be brought to trial before the happening of such event, should be entitled to file a bill in Chancery, to perpetuate any testimony which might be material for establishing such claim or right. The terms of this enactment, it will be observed, extend the remedy to claims to titles and dignities; it was previously confined to cases in which the right to some property was in dispute (*c*).

Titles and dignities.

This statute has since been repealed (*d*); but by O. XXXVII. rr. 35—38, the jurisdiction is continued, and the procedure in suits of this nature is now regulated thereby. Where the validity of a marriage, or legitimacy of a child is in issue, the Court is empowered to entertain a suit for the perpetuation of testimony by the Legitimacy Declaration Act (*e*).

Although actions in the nature of bills to perpetuate testimony have remained unaffected in principle by the Judicature Acts, bills for discovery, on the contrary, which were formerly analogous in many respects thereto, and which formed a conspicuous feature in equitable jurisdiction, have been rendered completely obsolete by the present procedure. It has been, therefore, deemed unnecessary here to discuss them. A study of the Orders under the Judicature Acts, in particular of Order XXXI., in any of the recognised handbooks thereto, will supply ample information as to the present means of attaining the ends formerly sought by bill in Chancery.

Bills for discovery obsolete,

Again, it is now scarcely necessary to do more than mention the bills to take evidence *de bene esse*, which once occupied a useful and important place in the auxiliary

and also bills *de bene esse*.

(*c*) *Townshend Peerage Case*, 10 Cl. & F. 289; and see *Campbell* v. *E. of Dalhousie*, L. R. 1 H. L. (Sc.) 462.

(*d*) 46 & 47 Vict. c. 49.

(*e*) 21 & 22 Vict. c. 93; see *Re Stoer*, 9 P. D. 120.

jurisdiction of equity. The purpose of these bills was to take the testimony of persons resident abroad. They could only be brought while an action was then depending: but they were available as well for a person out of as for one in possession; in both these respects differing from bills to perpetuate testimony (*f*). Ample powers of a similar nature were, however, long ago conferred upon the Courts of law (*g*), and at present such matters fall entirely within the province of Procedure, and consequently beyond the scope of this work (*h*).

(*f*) *Angell* v. *A.*, 1 Sim. & St. 83; *Warner* v. *Mosses*, 16 Ch. D. 100; 50 L. J. Ch. 28.

(*g*) 13 Geo. III. c. 63, s. 44; 1 Will. IV. c. 22, s. 1.

(*h*) See O. XXXVII. rr. 1—5; *Llanover* v. *Homfray*, 19 Ch. D. 224; *Bidder* v. *Bridges*, 26 Ch. D. 1; 53 L. J. Ch. 479.

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THE END.

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